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THE

UNCONSTITUTIONALITY

OF THE

PROHIBITORY LIQUOR LAW

CONFIRMED,

BY THE OPINIONS OF

GOVERNOR SEYMOUR,
JAMES W. GERARD,
SAMUEL BEARDSLEY,
DANIEL LORD,
GEORGE WOOD,
D. D. BARNARD,
GREENE C. BRONSON,
JAMES R. WHITING,
ROBERT J. DILLON,
A. OAKEY HALL,
NICHOLAS HILL, JR.,
HARRISON GRAY OTIS,
RUFUS CHOATE, AND OTHERS;

AND

THE DECISION OF THE SUPREME COURT,

OF THE

SECOND JUDICIAL DISTRICT OF THE STATE OF NEW YORK,

AND OF THE

HON. JAMES M. SMITH, JR.,

RECORDER OF THE CITY OF NEW YORK.

PUBLISHED FOR GRATUITOUS DISTRIBUTION,

BY ORDER OF

THE METROPOLITAN SOCIETY

FOR THE PROTECTION OF PRIVATE AND CONSTITUTIONAL RIGHTS.

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PUBLISHER'S ADDRESS

Immediately following the passage of the act entitled "An Act for the Suppression of Intemperance, Pauperism, and Crime," by the Legislature of the state of New York, measures were taken by a Meeting of Importers, Dealers, Hotel-keepers, &c., to procure the Opinions of some of the most eminent Members of the Legal Profession, upon the validity of that act. This being done, they were published in several of the daily papers of this city, and freely circulated, with the Opinions of Robert J. Dillon, Esq., Counsel to the Corporation of this city, and A. Oakey Hall, District Attorney.

The effect of this upon the public mind, has so abundantly demonstrated the propriety of the course, that "The Metropolitan Society for the Protection of Private and Constitutional Rights," (which had its origin from the Meeting referred to above,) have determined to meet the repeatedly expressed wishes of persons interested, by a re-publication of the same in pamphlet form, for gratuitous circulation, not only within our own state, but as extensively as we conveniently can, beyond it; and to prefix to them the Veto of Governor Seymour, of a similar act, passed in 1854; and to add to them the Opinion of Nicholas Hill, Esq., of Albany; and the admirable Letter of the Hon. Daniel D. Barnard; also, the Opinion of the Hon. Rufus Choate, on the so-called "Maine Law," of Massachusetts, with the highly valuable Letter of the Hon. Harrison Gray Otis, on "Sumptuary Laws," addressed to William Hayden, Esq., on the 8th of April, 1848, at Boston.

In confirmation of the views here expressed, we have the gratification of presenting to the reader, the Decisions of the Supreme Court, of the Second Judicial District of the State of N. Y., and of the Hon. James M. Smith, Jr., Recorder of the city of N. Y.

To the whole is appended the Law in question, entitled "An Act for the Suppression of Intemperance," &c.

A suitable Preface, or Introduction, precedes these documents, to which the readers attention is invited.

The Executive Committee of the Society believe, that the labor and expense attending this effort to give extensive circulation to a compilation of these valuable papers, is more than remunerated, in the fact that a large portion of our Union feel their interests to be interwoven with those of New York, in every act which tends to fetter commercial operations, but yet more especially, in one which abridges the liberty of citizens, and seizes upon their property without "due process of law."

While we commend the reading of these papers to the importer, manufacturer, and vendor of liquors, wines, and malt beverages, we are desirous that they should be, also, in the hands of others, who are not led away by infuriated fanaticism, and especially, that they may meet the eye of gentlemen of the law, in all parts of our interior, where the infamous principles of a "Maine Law" finds some Neil Dow, or Myron H. Clark, to give them impulse. It is our ambition to aid in defeating these enemies of constitutional right *every where*, and we hope that we are doing something towards it by this publication.

P. W. Engs,
Abraham Binninger,
Charles A. Stetson,
F. S. Cozzens,
T. J. Bayaud,
W. S. Corwin,
John P. Treadwell,
John W. Whitlock,
Joel Concklin,
John Baker,
Henry Snyder,
} *Executive Committee.*

New York, September, 1855.

PREFACE.

The following opinions on the law prohibiting the sale of wine and other fermented and distilled beverages in this state, are from the ablest lawyers and most virtuous citizens in the country. They are entitled to a respectful attention both from the learning displayed, the importance of the cause which has elicited them, and the character of their authors. The distortion of popular institutions, so as to become an instrument of oppression, and the anomaly of an act solemnly passed by a Legislature, and invested with all the outward forms of law, and yet despoiling men of their property in defiance of their constitutional rights, are alarming features in the history of jurisprudence; but the thorough exposure of these legal fallacies is the first step towards their utter repudiation, the vindication of individual rights, and the strengthening of the great bulwarks of the common law and the Constitution. The popular mind, which has been, to some extent, led away by the Will-o'-Wisps of false reforms, in the vain attempt of securing a fancied good, by unlawful means, may see its error and retrace its step, but this, though certain to be done, would only be a partial triumph, unless the sanctions of the fundamental law are solemnly re-affirmed, and the citadel of individual right, sapped by this invasion of fanatical legislation, is made impregnable for the future. So desirable a consummation has been accomplished by the labors, the learning, and the genius of the eminent legal intellects which have been employed in criticising the errors and the inherent weakness of this legislative incursion of fanatical despotism.

The agitation on the subject of the use of wine and beverages containing alcohol, must take its place in history alongside of

those numerous delusions which have temporarily gained possession of the human mind, and modified and controlled the actions and conduct of mankind. False theories in religion, in public policy, in social life, have existed before now, and created sects of devoted enthusiasts and partisans. Their errors and their practices embrace a mass of folly and absurdity, of disgusting wickedness and stubborn fiendishness that will justify the theological dogma of the utter depravity of a fallen nature. Wrapped in the contemplation of a single idea, the devotees of these false doctrines in morality, religion, or government, have waded through blood, trampled on all laws, human and divine, rejected the voice of reason, and the promptings of humanity, and left the tale of their atrocities to chill the heart and lower the pride of every reader, when he thinks that their perpetrators were men. So various have been the forms of these singular demonstrations of madness, that it would be endless to describe their characteristics and trace their resemblance. Even physical science has not been secure against such delusions; and mesmerism, and its kindred follies have found believers by thousands in the nineteenth century. It is painful to enter an asylum where the insane are separated from their fellows, to listen to the gibbering laugh of idiocy, the ravings of the maniac, and the stolid brutishness of the moping melancholic; but these horrid spectacles are but the shadows of the fleeting cloud when compared to the total eclipse of Mahometanism, Mormonism, Mesmerism, and kindred abominable delusions that overspread the minds of thousands and millions.

In order fully to appreciate the sentiments and conduct of the sect calling themselves "Temperance Men," "Teetotallers," "Rechabites," and the like, who, by dint of secret combinations for political objects, have at length secured the passage of laws inhibiting the sale, manufacture, and use of vinous liquors, it is necessary to take a cursory view at the objects they propose, and the scope of their imagined reform. For four thousand

years the race of men have used, as a beverage, fermented liquors, the basis of which were vegetable juices, containing sugar, or starch which is convertible into sugar. The presence of a ferment in such a saccharine liquid, induces a singular disturbance—a new combination of atoms, and the conversion of the sugar into alcohol and carbonic acid. The type of all these liquids, and that most universally, and from the earliest periods, used as a beverage, is wine. The earliest records of sacred and profane history hand down the use and the virtues of wine. Even the patriarch who links the ante-deluvian with the present race, is associated with the cultivation of the vine, and the use of its fruit—"And Noah began to be a husbandman, and he planted a vineyard, and he drank of the wine." What follows is a strange history of filial piety and filial ingratitude, inhumanity and disrespect, and the solemn preacher who had announced the flood, hurled on the progeny of the undutiful and unsympathizing son a curse which, even yet, men are taught to believe, works its awful mission on a prostrate and degraded race. A race who live at once the life of brute nature and wretched servitude, and as they are unblessed by civilization, so too, they are deprived of that genial and inspiring cup which the dawn of art placed in the hands of mankind, and which is yet the potent restoration of exhausted nature, the pledge of social feeling and friendship, an invigorating draught to the convalescent, and "the milk of the old man." In all ages and in all countries men have employed these beverages. The instinct which has dictated their use has been all but universal. In northern countries where the vine does not yield its fruit, substitutes have been discovered. In ancient Scandinavia the inhabitants drank mead and metheglin, products of the fermentation of honey. Other northern nations, like England, have, as their national beverages, various malt liquors, beer, and ale. The Tartar concocts a fermented draught from the milk of his mares. The Mexican obtains pulque from the juice of the American aloe, the agave. The date in the tropical countries of the Eastern continent furnishes a species of wine. The general

use of these drinks is a notable fact, the importance of which cannot be disregarded either by the advocates for their employment, or those who condemn the practice. The literature of all ages is full of the praises of wine. The inspired writers do not condemn its moderate use. In the lofty imagery of the Hebrew prophets, wine is often introduced in such terms as to show that it was regarded as a divine boon to men, and as a symbol of especial favor. The poets of antiquity, from Homer down, are full of the glories of wine. It was the drink of heroes and demi-gods, and then, as now, the source of pleasure, and the seal of friendship. The wisest of the sages of Greece did not refuse the genial influence of wine, and the pure morality of Socrates thought it no stain to discourse on the soul and immortality while thus indulging. The example of a sublimer teacher than Socrates, may be adduced with the sign of a mighty miracle, when at Cana

"The conscious water heard its God and blushed."

While, however, the general consent of humanity and the authority of the noblest intellects and the purest hearts, have justified the moderate use of wine, it is not to be denied, that a thread of protest has kept pace from the time of the ignoble son of the patriarch to the present, in opposition to the practice. It too, has its source deep in the nature of man. Asceticism has always existed as a moral element in the practical reason. Gloomy and mystical it expresses the idea of the value of suffering, pain, and sacrifice. Hence arises fasts and vigils, maceration and tortures. Here the enthusiast finds a moral exercise, that gratifies his high wrought imaginations of a wrathful divinity and gives a proof of his own sincerity and devotion. The sons of Rechab in sacred history, and the Essenes at a later period of the Jewish nation drank no wine. They were commended, not for their self-mortification, but for their obedience to their vows so much resembling the modern pledge of kindred abstinents. The stoics among the ancient Greeks exhibited the same contempt for pleasure, and exemplified the same tendency towards asceticism

in the sects of ancient philosophy. Just because this gloomy spirit is proud, ungenial, and persecuting, because it is the source of bigotry and the enemy of charity, it must be condemned as dangerous in all its forms. Ascetism in religion is the parent of superstition and persecution, in philosophy of indocility and dogmatism, in society of rigor and unhappiness. Beneath it, as a cloak, hypocrisy stalks, bigotry counts it a virtue, and zealots after hardening out all human feeling from their own breasts by self-inflicted tortures, are prepared to find a fiendish gratification in the pangs of others. The same mental disposition, that would ordain abstinence from meat, from sleep, from pleasant social intercourse, that would prescribe suffering and mortifications, that would wrap society in a funereal pall, and blot pleasure from the world, substituting for it a sour and gloomy self-denial, would also banish wine from the board and forbid its sale and manufacture.

Overlooking the manifold uses of wine and similar beverages, the advocates of an indiscriminating exclusion of them, some twenty-five years ago, began to agitate on the subject, founding their arguments on the most extravagant exaggerations. Thus they connected the drinking vinous beverages with crime, as a positive necessity, forgetting that crime exists to an equal or greater extent in countries, where sobriety prevails, and on the other hand that the great mass of these, who use wine in moderation are at least as free from violations of the moral and municipal codes, as those who are abstinent, either through physical or moral causes. The grand totals of national expenditures, insignificant as the amount paid by individuals in the purchase of what they use, were paraded with an imposing array of figures, and had no little effect on the national mind. The physical effects of the practice were equally distorted and exaggerated. Every pious fraud, every ingenious stratagem, and every falsehood and sophism were called in requisition by these agitators. It is not to be denied, that they have mightily swayed the popular mind.

There was a class all this while, the most influential in the country for their talents and culture, that kept aloof from this agitation, partook in moderation of their usual beverages, and regarded the tendencies of the times with too much equanimity, even when they saw the leaders of the new sect preparing to climb into power by the aid of secret societies, and seeking, by the same machinary, to abridge the liberties of the masses by the passage of sumptuary laws.

Among the earliest points abandoned by a species of tacit consent to the total abstinents, were the physiological relations of vinous beverages to the bodily system. They claimed, that any thing which contained alcohol was a poison—that the most minute quantity of this element was pernicious—that it could not be regarded as a nutriment, or even a stimulus consistent with health, and that the moderate use of these drinks differed only in degree from the excessive. It is only within a few years, that the discoveries in organic chemistry have begun to throw light on the transmutations of food, and the part it plays in the animal economy. Liebig, the great authority on this point, has decided, that alcoholic drinks are taken up and furnish to the lungs material used in respiration. Further, that this process economizes the tissues of the body and prevents that waste of power, which is the cause of so many diseases. Thus alcoholic drinks may be considered not only as fuel in the machinery of the human frame, but as the oil, which prevents the wearing out of its structure. This is the opinion of Liebig, and it outweighs in scientific value, the baseless assertions of the whole tribe of tectotal lecturers and temperance fanatics. Myriads of scribblers, may write leaders in Maine Law newspapers, but they cannot shake the conclusions drawn from the observations of that profound and illustrious chemist. This conclusion supports the experience of mankind in all ages, and justifies the instinct of the race, which has led to the so general use of these beverages.

The earliest demonstrations of the advocates of abstinence, were very different from their present position. They sought to prevent excess, and did not, as a body, condemn the moderate use of these stimulants. The first society formed in this state, allowed the use of wine, and was only aimed against the habit of drinking distilled liquors. But some more zealous reformers urged that the drinker of distilled liquors would retort against those who advised him to abandon the use; that his monitors drank what derived its effects from the same substance, and only differed in degree from his more potent draughts. In the year 1841, after an exciting presidential election, what was called the Washingtonian Pledge was adopted. Under this popular, but most inappropriate title, there took place a remarkable excitement on this subject. Thousands and tens of thousands took the pledge. Preachers and lecturers on total abstinence, travelled through the country. Men were honored in proportion to the degradation and excess whence they had emerged. The country was drunken with cold water, its praises were sung to every popular tune, and the experience of the reformed sot received more applause, from the excited audiences, than the exhortations of the most rigid precisian. By-and-by the songs ceased to be chaunted —the meetings were discontinued—men relapsed into their former habits, and the pledge lost its magic. It was estimated that not less than half a million took the pledge and back-slided in the course of two years. It ran counter to the physical wants of human nature, and prevented a free participation in those scenes of innocent conviviality and social intercourse that cheer the journey of life. Men shook off the burden which they had assumed in a moment of excitement, and resumed their natural freedom. The morality of taking these oaths and vows may be seriously questioned; but, leaving this matter to casuists, there is no doubt but that the pledge, and the despair and sense of turpitude connected with its breach, have made shipwreck of the hopes and lives of thousands. The sect had, however, gained ground in spite of these defections, and when the loose associations into

which the converts, made by the songs and speeches of the temperance Bacchanals, were dissolved, they organized into secret societies, under the titles of "Sons of Temperance," "Rechabites," "Templars of Honor," &c. Their number prompted the ambition of unscrupulous men, who saw, in these secret orders, the means of establishing a strong political party, by means of which they might be advanced to place and power.

Of course, the party must have an object, and what more proper than to compel the state to pronounce the "pledge," and fasten it like a badge of servitude on the citizens. The first experiment was made in Maine, and in 1851, a prohibitory law was passed in that state, by the exertion of one whose subsequent course has shown how far he can lay claim to the character of disinterestedness and philanthropy. Let Neil Dow take all the credit he can, associated with the Maine Liquor Law; though even here, it is understood, he has taken the credit of another's invention, and the law will, in turn, derive a crimson hue from the hands of its author. It was passed by the Legislature in May, approved by the Governor on the 2d of June, and was in triumphant mockery set in operation on the 4th of July, 1851, A desecration of the anniversary of freedom that other teetotal Legislatures have imitated with rather questionable taste.

It has been adopted with inconsiderable variations in a number of northern states. In New York, it was adopted on the 9th of March, 1854, and vetoed in the able message which will be found in this volume.

The secret societies and the zealots, redoubled their efforts, they made bargains, and coalitions, and the law was again passed, on the 11th April, 1855, and approved by Governor Clark.

The errors of this sect of total abstinents, will be exposed; the light of science will show their mistakes in physiology and vital

chemistry; their morality will be shown to be defective, their religious tenets unsound. But the mistakes in their legal handiwork, can never be better demonstrated than in the contents of this volume. It will be shown here, how greatly this prohibitory law contradicts the spirit of the common law, and the individual rights secured since Magna Chartar. How repugnant it is to the plain provisions of the Constitution—and what a violation of common decency, on the part of those who perpetrated this tyrannical act.

Though these are the opinions of professional men, yet they deal not with technicalities, but with the grand leading principles of law and freedom, and they are free from that subtlety which attends arguments based on mere precedents. It will be unnecessary to read them with any other book of reference, than the Constitution. That they shall be read in a liberal and unprejudiced spirit, is all the favor the Metropolitan Society for the Protection of Private and Constitutional Rights, ask from the public.

GOVERNOR SEYMOUR'S VETO.

Objections to the Bill for the Suppression of Intemperance, Returned to the Legislature by Governor Seymour.

EXECUTIVE CHAMBER,
ALBANY, March 31, 1854.

HON. SANFORD E. CHURCH, *President of the Senate:*

As I do not approve of the bill entitled "An act for the Suppression of Intemperance," I return it to the Senate, in pursuance of the directions of the Constitution of this State, with my objections to its becoming a law.

I have given to the bill the respectful consideration due to the importance of the subject, and the deliberate action of the two branches of the Legislature.

I cannot sign the bill, for I believe its provisions are calculated to injure the cause of temperance, and impair the welfare of the state.

Anticipating action on the subject of this bill by this Legislature, I took occasion in my annual message to suggest that "it was surrounded with difficulties and embarrassments, and unless legislation, in regard to it, was judicious, it would increase the evils it was important to prevent; that any measures adopted should be framed so as not to conflict with well settled principles of legislation, or with the rights of our citizens." This bill is unconstitutional, is unjust and oppressive in its character, and subversive of well settled principles of legislation.

The people, irrespective of their different views of the use of intoxicating liquors, when advised of its provisions, will regard them with surprise and alarm.

The sale of strong or spirituous liquors or wines, in quantities less than five gallons, is now prohibited, and offenders are liable to be fined or imprisoned.

To this general rule there are two exceptions. The supervisors and justices of the peace in each town, acting as commissioners of excise, are authorized to license persons of good moral character, to keep travellers where intoxicating liquors can be sold, provided they have accommodations to entertain travellers, and a tavern is absolutely necessary at the place where the applicant proposes to keep the same. The commissioners are, also, authorized to grant licenses to grocers to sell strong and spirituous liquors and wines, but not to be drunk in their shops, houses, out-houses, yards, or gardens.

The statute further imposes restraints upon the sale of intoxicating liquors by licensed tavern-keepers or grocers, to apprentices or minors. Violations of the terms of these licenses are punishable by fine or imprisonment. The evils which spring from the use of liquors in the shops and drinking houses, are mainly owing to the fact that the present laws are not enforced. In addition to this, the excise officers are elected by the people of their respective cities or towns, and the citizens of each locality can prevent the issuing of all licenses by electing those who are opposed to granting them.

The people of this state are divided in opinion with regard to the propriety of using intoxicating drinks. One portion desire the passage of a law which will prohibit their sale, while another, embracing those engaged in various pursuits and professions, regard their use as proper, although they deplore the evils of intemperance.

These differences of opinion have given rise to earnest discussions, and led to the formation of societies and associations to check intemperance, and to persuade all to abstain from the use of intoxicating liquors.

The bill which I now return, proposes legislative interference. It is designed to compel abstinence by severe fines and penalties, and by directing seizure and destruction of liquors kept contrary to its provisions.

The ninth section of this act directs, "Whenever complaint, on oath or affirmation, shall be made in writing to any magistrate, by any two or more credible persons, residents of the town or city where the complaint is made, that they have reason to believe, and do believe, that intoxicating liquors are kept and deposited, intended for sale by any person not authorized to sell the same in any place whatsoever, within said city or town, or upon any water adjacent thereto, or within five hundred yards of the boundaries thereof, which complaint shall state the facts and circumstances on which such belief is founded, it shall be the duty of such magistrate, if he be satisfied that there is probable cause for such belief, forthwith to issue a warrant commanding the officer to whom the same shall be directed, with proper assistance, forthwith diligently to search such place in the day time, and to seize all intoxicating liquors found therein, together with the vessels within which the same are contained, and to store the same in some safe and convenient place, to be disposed of as hereinafter provided. But no warrant shall be issued under this or the preceding section, to search any dwelling house in which, or in part of which, a shop is not kept, except upon proof that intoxicating liquor has been sold therein by the occupant thereof, or with his consent, within one month before the time of making such complaint. Every warrant so issued, shall designate and describe the place to be searched."

The eleventh section of the Bill of Rights asserts, "That the right

of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, ought not to be violated, and no warrant can issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized." The same declaration is contained in the Constitution of the United States.

This provision of the Constitution of the United States, and declaration in the Bill of Rights, were designed to prevent the issuing of "general warrants." They were suggested by the controversy in Great Britain, growing out of the resistance of the friends of civil and constitutional liberty, to the exercise of pretended preogatives of the crown. This controversy called forth able expositions of the rights of citizens, and excited profound interest in Great Britain and its dependencies.

The principles advocated by those who were the bold and eloquent defenders of the colonists, were impressed upon the minds of the men who formed our political institutions. The decision against "general warrants," by Lord Camden, whose memory will ever be held in reverence by the American people, for his defence of their rights, and for his great abilities as a judge and statesman, was received with the utmost enthusiasm by the friends of constitutional liberty. He declared that to enter a man's house under color of a 'general warrant' in order to procure evidence, was worse than the Spanish Inquisition—a law under which no Englishman would wish to live an hour. It was a most daring attack upon the liberty of the subject."

The warrant to be issued under the ninth section of this bill, is obnoxious to all the objections urged against "general warrants," and conflicts directly with the declaration in the Bill of Rights. It is not directed against any person, and, therefore, is a nameless warrant. It authorizes officers, in the absence of the owner of the premises or property to be seized, to search wherever malice or their suspicions may lead them. It does not describe the thing to be seized, by quantity, quality, or marks. The complaint may only charge that certain described liquors are kept contrary to law, but the warrant must command the officer forthwith diligently to search the place designated, "and to seize all the intoxicating liquors found therein." The liquors may be entirely different in their character, and may be owned by a great number of persons under various circumstances. In case complaint was made because one cask of liquor in a warehouse, canal boat, or other vessel, was, in the belief of the complainant, designed for sale by a person not authorized, the officer would be compelled to seize all other liquors it contained, although they should be the property of different owners, and there should be no pretext nor complaint that they were designed for sale. It is made the duty of the officer to seize them, even if it be perfectly apparent to him, that they are designed for shipment to another state or foreign market, or are imported and remaining in the original packages.

Many of these objections apply with equal force to the eighth section of this act. It is no answer to these objections, to say that the articles cannot, in the nature of things, be more particularly described, or that artifice will be resorted to, to conceal the real owner of the liquors and their intended use. The inadequacy of all human laws to reach and punish offenders of every grade, can never be obviated, and furnishes no reason for overthrowing the great principles of justice or the safeguards of the Constitution. To assent to this, would be to create a far greater evil than that for which a remedy is sought.

New York was, for some time, unwilling to accede to the Union of the States without amendments to the national Constitution; which among other things, should shield the persons and property of our citizens against unreasonable searches and seizures.

When it finally adopted that Constitution, its assent was accompanied by a resolution, that it was in full confidence that the proposed amendments would be ingrafted upon it. This was done, and our state should be the last to violate principles adopted in accordance with its demands.

The directions for seizing intoxicating liquors, contained in the laws of Massachusetts, are similar to those of this bill, and in most instances the same terms are used. The distinguished Chief Justice of that state in a recent and elaborate opinion, held such proceedings to be in violation of the Bill of Rights of Massachusetts, which contains declarations on the subject of searches similar to those of New York. It is true that the Bill of Rights of this state, has not the authority of the Constitution, but with the law-making power, it is entitled to equal regard.

It consists of declarations of great and universally conceded truths—political axioms, which constitutions and laws are designed to maintain and defend. This act is more open to the objections urged against "general warrants," than the provisions decided in Massachusetts to be void. It is declared in both acts, "That no warrant shall be issued under this or the preceding section to search any dwelling house, except upon proof that intoxicating liquor has been sold therein by the occupant, or by his consent, within one month before the time of making such complaint."

The protection this clause apparently gives to the homes of our citizens, is practically destroyed by the following extraordinary rule of evidence, laid down in the thirty-second section of this bill, and which is not contained in the law of Massachusetts.

"§ 32. Upon the trial of any complaint or civil action, commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale. Whenever an unlawful sale is alleged, and a delivery proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale."

In other words, when an unlawful sale of liquor is alleged, it is sufficient to convict the accused of a misdemeanor, to subject him

to a fine and imprisonment, and to a forfeiture of his property, merely to show a delivery of liquor, an act legal, and, under some circumstances, commendable.

Reserving every principle of evidence and justice, proof that a citizen has given and delivered to another any intoxicating liquors, although it may be for mechanical purposes, by a monstrous legal finerence, convicts him of a crime. Thus, without proof of guilt, he is condemned unless he can prove his innocence.

What security have our citizens against the invasion of their homes, by officers who are directed, without regard to the presence or absence of their occupants, diligently to search their dwellings—where the proof of an innocent act is sufficient to convict of an offence, and to place his home upon the level of the shop or warehouse. This act is highly penal, and the searches which it directs are designed to seize property, and to procure evidence of a violation or intended violation of the law.

The domicil of the citizen has heretofore been considered so sacred, has been so fortified and defended by the principles of the common law, that it is familiarly spoken of as his castle. It cannot legally be searched, although the occupant is charged with murder or treason. Under the most tyrannical sovereigns of England, this principle has been preserved by the courts. The only deviation is in cases of searches for stolen property, which are allowed upon the ground, that they are designed to restore it to its rightful owners. Even this exception has been regretted by eminent jurists, and its propriety doubted. What cannot legally be done to detect the darkest and most dangerous crimes, is directed by this bill, to procure evidence of guilt, and to forfeit property for acts which are now legal, and the criminality of which is adjourned over until the close of the present year.

The thirteenth, fourteenth, and seventeenth sections of the bill, directing the forfeiture and destruction of liquor, are unconstitutional. It is declared in section five, article first of the Constitution, that "no person shall be deprived of life, liberty, or property, without due process of law."

Section nine of the bill directs the officer, when a warrant is issued to search any place, "to seize all intoxicating liquors found therein." If complaint is made that a single cask in a vessel, or custom or warehouse, is unlawfully designed for sale, all other intoxicating liquors in such vessel, custom or warehouse, must be seized, although there is no complaint nor pretext that they are to be used for any unlawful purpose. These are usually stored in large quantities in our commercial towns. Any person placing a single cask of intoxicating liquor which is unlawfully owned, in a place where such articles are stored, subjects them all to seizure. This may be done by malicious persons, with a view to cause their seizure, or to take advantage of this unguarded law to take possession of property with fraudulent designs. After this sweeping seizure, if the owners are unknown or cannot be found, and

their places of residence are not known to the officer, he is directed to deliver a notice to any person of mature age residing in the place where the seizure is made, or if none such can be found, by posting the notice upon the outside of the premises, and in two conspicuous places in the city or town.

This makes it a question of intent of which it is impossible to give "positive proof." There is nothing in the Act requiring the complainant to appear against the owner, so that he may be informed of the nature and cause of the accusation, in truth on complaint may have been made against him or his property. It is not required that he shall be confronted with the witnesses against him; his guilt is assumed. True, it is provided that the magistrate or jury shall hear the proof or allegations, offerred in support of and against the claimant, and witnesses may be compelled to attend, but, until the claimant has first shown, by "positive proof," his ownership of the property, its legality, and that he kept it for lawful purposes, the law requires no allegation and proofs against him; the case is complete by the original exparte oaths, upon which his property was seized by warrants. Reversing the order of every other known proceeding, he stands convicted, until his innocence is proved, upon charges made against other parties. This is not "due process of law." This point was recently decided in the Supreme Court of Massachusetts, where the same question was involved. The language of the Bill of Rights of that state, is not as decided against such forfeitures as the Constitution of New York.

The other objections I shall urge against this bill, apply to provisions which are not contained in the laws of Massachusetts, nor should they be found among the statutes of any state. They are opposed to all well settled principles of common law, dangerous to the liberties of our citizens, and repugnant to the religious and moral sentiments of the community.

Whatever differences of opinion there may be, with regard to laws, prohibiting the sale of intoxicating liquors, there will be none with respect to some features of this bill.

Section nineteen provides, that "whenever complaint on oath or affirmation in writing, which complaint shall state the facts and circumstances upon which his belief is founded, shall be made before any magistrate, by any person, that he has just cause to suspect, and does suspect and believe that any offence against any provision of this act has been committed, and that some other person or persons named by him, has or have knowledge of the commission of such offence, such magistrate, if he thinks there be probable cause to believe that such person or persons has or have knowledge of the commission of such offence, shall forthwith issue a summons to the person or persons so named, commanding him or them to appear before him at a place and time not more than two days thereafter, to be designated in such summons, to testify in relation to such complaint."

Section twenty-one directs, that "Whenever any person shall appear or be brought before any magistrate, as provided in the two preceding sections, it shall be the duty of such magistrate to administer to such person an oath or affirmation, and to examine him for the purpose of ascertaining whether any offence has been committed against any provision of this act. If such person shall refuse to be sworn or affirmed, or to answer any question pertinent to such examination, he shall be committed to the common jail, there to remain until he shall consent to be sworn, or affirmed, or to answer.

"If, upon such examination, it shall appear that any such offence has been committed within the jurisdiction of such magistrate, it shall be his duty to issue a warrant for the arrest of the offender, and the search of his premises, as herein before provided."

In order to subject any citizen to this inquisitorial proceeding, it is only necessary that complaint be made, which need not state nor prove that an offence has been committed, but only suspicions, and facts upon which they are founded, to authorize the magistrate to bring before him, by summons of attachment, the person suspected of having some knowledge of a suspected offence. This he may do, although no proceedings have been commenced against persons or property, no trial pending, no right to the services of counsel or open hearing secured. The person brought up for examination may be and is most likely to be the offender himself, yet the magistrate may put to him such questions as he may deem necessary in this search of offence. If the party summoned refuse to comply to such questions, he is to be committed to jail, there to remain until he consents to answer.

Section sixth of the first article of the Constitution, declares that no person "shall be compelled in any criminal case to be a witness against himself."

By the proposed act, if the fact should be of a character to criminate the party under examination, he would still be compelled to answer or be imprisoned. If he answers untruly, it is made perjury by the act. If he admits that he has committed an offence, it is made the duty of the magistrate to arrest him and search his premises. If this bill should become a law, this unprecedented proceeding would be perverted to the worst purposes. It would be used to obtain testimony in civil and criminal suits not growing out of this law, but arising out of the ordinary transactions of life. Proceedings so tyrannical and unusual would tend to strife, bitterness, and resistance to the laws.

There are nearly four thousand local magistrates before whom these proceedings may be had. There are to be no limitations of their powers, they are not to be subject to the rules of evidence, nor restrained by the rights of witnesses; they may ask such questions as their discretion shall dictate, and compel answers by imprisonment; the character of the investigation and the imprisonment are determined by the discretion of the justice.

The eloquent denunciations of a distinguished jurist, apply with peculiar force to this proceeding. The discretion of a judge is the law of tyrants; it is always unknown, it is different in men; it is causal, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."

Section twenty-six of this bill provides that "Any person may maintain an action to recover any money paid, or the value of any services, or labor rendered or done, or the value or possession of any property, assigned and conveyed, in payment for liquors sold contrary to the provisions of this act, by the husband, wife, parent, child, ward, apprentice, or servant of the plaintiff, and in such action, the person by whom such money was paid, services or labor rendered or done, or property assigned or conveyed, if not a party to the action, or the husband and wife to the party, shall be a witness to any matter pertinent to such action. Any married woman may commence and maintain such action in her name, with or without the consent of her husband."

Under section twenty-nine, another action may be brought by the same parties, "against any other person who shall sell any liquor contrary to any provision of this act, to the husband, wife, parent, child, guardian, ward, apprentice, or servant of the plaintiff, or who shall intoxicate or cause such person to be intoxicated; and it shall not be necessary in any such action to aver or prove any special damage, but the court or jury before which such action is tried, shall assess the damages of the plaintiff therein; but any special damage may be shown. Any married woman may main tain any such action in her own name, with or without the consent of her husband."

These two sections create rights of action heretofore unknown. Under one, the persons designated can recover money they have never paid, and under the other, maintain an action for damages which they have never sufferred. The sympathy which is naturally, and justly extended to suffering wives and children, and the indignation excited by the belief that the seller of liquor has often turned a deaf ear to their entreaties, must not lead us to create evils on the other extreme, nor to be blind to the unlimited effects of these sections. They do not make proper discriminations. They would permit the wife, parents, and each of the children of a temperate, intelligent, and virtuous man, without regard to their number, age, or condition, to recover money which never belonged to them, and which may have been paid to an unlicensed seller for liquor purchased for mechanical, medicinal, or even sacramental purposes. After the children, parents, or wife of the buyer have recovered the amount paid to the vender, the latter may again be sued by each of the described persons under the twenty-ninth section.

In this action it is not necessary to show any violation of law except by the intentments consequent upon proof of the delivery

of intoxicating liquor. In the multiplied suits which may be brought under this section, before a justice of the peace or other magistrate, it is not necessary to prove or aver any special damage, but upon mere proof of the delivery of intoxicating liquors, the jury are authorized to assess damages at their discretion. The defendant is liable to be deprived of his property by a prejudiced or excited jury, without having any of the usual protections which our laws afford to the most dangerous and hardened criminal. He is denied the benefit of the intentment that he is innocent until he is proved guilty. Under our laws, in certain cases, juries are authorized to give vindictive damages where the violation of the law is shown by actual proof, and the character of the transaction is brought to their knowledge; the evidence in such cases affords some guide to their judgment, and the unjust verdict may be corrected; but under this section they may have before them only presumptions and intentments of guilt, and nothing to restrain their passions or prejudices. The section creates new rights of action, and abolishes salutary modes of proceeding and the best principles of evidence.

It is not the due process of law, required by the Constitution of the state. The suits under this section, and all other suits, civil and criminal, authorised by this bill, to be tried subject to the provisions of the thirty-second section, are not trials in any sense that form is understood by our Constitution and laws.

There are other objections to the twenty-sixth and twenty-seventh sections. The domestic relations are deemed sacred, not only by the laws of the land, but by the religious and moral sentiments of our people. There are but few, who under the influence of novel ideas and theories, seek to impair these relations.

The public sentiment would approve of a law, which should give a right of action to the wife and children of intemperate husbands and fathers, against those who should sell them intoxicating liquors, and which shall subject the defendant to exemplary damages, if found guilty, after a fair trial. But the lawful head of the family should not be deprived of the respect and authority due to his position, until he has forfeited them by his misconduct.

Suits brought under these sections, where the father is the buyer and a temperate man, necessarily implies that he is the instigator of a dishonest prosecution on the part of his wife or children, or that he is to be made an object of contempt by them. It makes his home a scene of strife, or a place where fraud is plotted. In order to maintain suits, it is not necessary to show that the father is an intemperate man, incapable of managing his affairs, or that the liquor was purchased for the purpose of drinking; he is not even guilty of an offence when he buys. It may be said that the seller should not violate the law under any circumstance. But the worst of criminals must not be deprived of the protection of the principles of justice. The act multiplies penalties, fines, forfeitures, and actions against the alleged offender and at the

same time deprives him of this constitutional right of presumptive innocence.

The thirty-third section of the bill directs that "no person or corporation shall knowingly carry or transport any liquor, from place to place within this state, or from any place without this state to any place within this state; and no person shall knowingly deliver any liquor to any other person, or to any corporation, for the purpose of being so carried or transported, unless the name and place of business, or residence of the person to whom the same is to be conveyed, together with the words 'intoxicating liquor,' are distinctly marked on the outside package in which the same is contained."

This regulation cannot be of great importance in carrying out the objects of this law, but it would, in connexion with the provisions for the seizure of liquors, inflict a severe blow upon the great carrying and commercial interests of the State of New York.

As there would always be a liability on the part of citizens of other states to overlook or neglect these police regulations, they would create constant embarrassments to our domestic commerce. The law recognizes the legality and propriety of manufacturing, transporting, and using intoxicating liquors; but if it subjects them to penalities and forfeitures upon light proofs, or for imputed offences, which are proved by the mere fact that they are found in vessels or storehouses with liquors illegally held, it will divert from our canals, our railroads, and our cities, not only this particular commerce, but all that is connected with it. The citizens of other states will not separate their diversified productions when they send them to, or obtain them from the markets of the east. If we drive off a portion of their commerce, their convenience and interest will be promoted by withdrawing the whole and seeking other channels which are free from embarrassments.

The idea pervades the bill, that unusual, numerous, and severe penalties, will secure enforcement; but all experience shows that the undue severity of the laws defeats their execution.

After the excitement which enacted them has passed away, no one feels disposed to enforce them, for no law can be sustained which goes beyond public feelings and sentiment.

I have omitted any notice of many defective provisions in the bill, as they might be corrected by future legislation. I have confined my objections to those which are radically wrong, which are inconsistent with the principles of justice, with the rights of persons and of property, and which so pervade the bill that they cannot be stricken out without destroying the entire fabric. The bill is wrong, because it directs unreasonable searches of the premises and dwellings of our citizens, under circumstances calculated to provoke resistence: it deprives persons of their property in a manner prohibited by the Constitution: it subjects them on mere suspicion of knowledge of a suspected crime, to an inquisitorial examination.

For one act of alleged violation of law, a citizen may be proceeded against as a criminal—be fined or imprisoned, and his property seized or forfeited—he may be proceeded against in civil suits, by various parties by whom he has had no dealings, and subjected to the payment of damages where none have been averred or proved. To all these prosecutions he may be subjected without the benefit of trial, in the usual and judicial meaning of that term.

The Constitution makes it my duty to point out the objectionable features of this bill, but I owe it to the subject, and to the friends of the measure, to add the expression of my belief that intemperance cannot be extirpated by prohibitory laws. They are consistent with sound principles of legislation. Like decrees to regulate religious creeds or forms of worship, they provoke resistance where they are designed to enforce obedience.

The effort to suppress intemperance by unusual and arbitrary measures, proves that the Legislature is attempting to do that which is not within its province to enact, or its power to enforce. This is the error which lies at the foundation of this bill—which distorts its details, and makes it a cause of angry controversy.

Should it become a law, it would render its advocates odious as the supporters of unjust and arbitrary enactments. Its evils would only cease upon its repeal, or when it became a dead letter upon the statute book. Judicious legislation may correct abuses in the manufacture, sale, or use of intoxicating liquors; it can do no more.

All experience shows that temperance, like other virtues, is not produced by law-makers, but by the influence of education, morality, and religion.

While a conscientious discharge of duty, and a belief that explicit language is due to the friends of this bill, require me to state my objections to the measure in decided terms, it must not be understood that I am indifferent to the evils of intemperance, or wanting in respect and sympathy for those who are engaged in their suppression. I regard intemperance a fruitful source of degradation and misery. I look with no favor upon the habits or practices, which have produced the crime and suffering which are constantly forced upon my attention in the painful discharge of official duties.

After long and earnest reflection, I am satisfied reliance cannot be placed upon prohibitory laws to eradicate these evils. Men may be persuaded—they cannot be compelled to adopt habits of intemperance.

I concur, with many of the earnest and devoted friends of temperance, in the opinion that it will hereafter be a cause for regret, if the interest which is now excited in the public mind upon that subject, should be diverted from its proper channels and exhausted in attempts to procure legislation which must be fruitless.

HORATIO SEYMOUR.

OPINION OF

JAMES W. GERARD, ESQ.

ON THE PROHIBITORY LIQUOR LAW.

My opinion has been requested by a committee of importers and dealers in foreign and domestic liquors, on various questions submitted by them, arising under the Prohibitory Liquor Law, passed at the last session of the Legislature, involving a construction of some of its provisions and the constitutionality of others.

The first and second of these questions—viz:

1. What is the effect, extent, and application of the following words, at the conclusion of section one? viz: This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States; and

2. If a right to sell any particular description of liquor is reserved and excepted, then is that right general in its nature, or is it limited and confined to any particular persons; and if so, to whom?

I propose to consider together.

I am not aware that there is now in force any treaty or law of the United States in terms conferring the right to sell "liquor" in this state. The right of introduction, however, is independent of state legislation, and is permissively derived from the practical operation of treaties of commercial amity and intercourse subsisting between the United States and European nations, exporting wines and spirits from those countries into this, and the various provisions of the tariff acts. These latter confer the privilege of importation, and that privilege, it has been judicially determined, carries with it in favor of the original importer the unrestrictable right of sale.

The words, "This section shall not apply, &c.," therefore, in the position in which they stand, need not necessarily be construed as a declaration simply of a right which no state legislation could affect, but are entitled to receive a more extended application, founded on the context and the power of the Legislature, in relation to the interal traffic in ardent spirits of every kind. I understand it to be substantially established, by various decisions of the Supreme Court of the United States, that a state, in the exercise of its police powers, may, so far as internal traffic is concerned, regulate, even possibly to the extent of prohibition, the sale of any article which it may adjudge noxious or injurious to the health or morals of its citizens, even though the inhibited article

may originally have formed a part of the foreign commerce of the country. Such a prohibition, restrained by the right of the importer to sell imported liquor in its original packages, is substantially the end of all laws relating to the sale of liquor, whether of license or prohibition.

If, therefore, the power of prohibition, when exercised, can be exercised against the article "*in rem.*" it appears to me that an exception of proviso, in terms as broad as the one under consideration, should receive a similar construction as to the extent of the permission, and should exist in favor of the exempted article in whose hands soever the same may be—importers and purchasers from them, dealers and retailers—for this is a statute restrictive of the rights of persons and property, highly stringent in its remedies, penal in its consequences, and therefore must be construed most strictly against the prohibition, and liberally in favor of the permission to sell. Taken literally, the permission is general, broad, and clear, allowing imported liquor to be sold generally, and not limiting its sale to the importer. It is an express permission of the thing to be sold, and not a permission of sale given to the importer or any class of persons. In other words, it declares in effect that the act does not apply to imported liquors; and there is no other section that I can find which limits or restrains the general permission in the first and great enacting clause. On the contrary, the provision in the latter part of the seventh section, that "on the trial of such claim the Custom House certificates of importation, and proofs of marks on the casks or packages corresponding thereto—shall not be received as sufficient evidence that the liquors contained in said casks or packages are those actually imported therein," strongly confirms my position that imported liquors are exempted from the operations of the act, but requiring that additional evidence shall be given of its foreign character besides the Custom House marks on the cask in which it is contained. It also appears to me, as if, after the bill had been framed, the last clause of the first section had crept into the act, and that the friends of the law did not see its effects in exempting imported liquors from the operations of the act.

I conclude, therefore, that the prohibitions, penalties, and forfeitures in the act contained, have no application to the sale or keeping of such liquor, as pursuant to the commercial regulations of the United States, is a subject of importation, whether it be in the hands of the original importer or retail dealer.

The third question—"Is the keeping in a storehouse other than a bonded warehouse, of a stock of liquor on hand previous to the 4th of July, 1855, within any of the prohibitory clauses of the act, the same not being intended to be sold or given away."

I answer that I think it is intended by the Legislature so to be, but am of the opinion that the provisions of the law which affect the general right of property in these articles, and direct its destruction, are unconstitutional and void, for the reasons presently given.

The fourth question—"Does the act, in terms or by necessary implication, prohibit the manufacture of liquor, as defined by section twenty-two, for export to other states, or the sale within this state of liquor manufactured in other states?" I answer, as to the first branch, that the manufacture of liquor in this state is not, in terms that I can perceive, expressly prohibited, nor its export; yet that the practical operation of the seizure clauses of the law, were they constitutional, would virtually put an end to the manufacture or production of domestic liquor. But if these are unconstitutional, and therefore void—and I think they are—a distiller or brewer has, for aught I can perceive, a right to make and export liquor to be sold in other states, if he does not make it to be sold within this state—and this view seems to be supported by the exemption of the prohibitory words of the first section, to the case of its transportation from one place to another, or its being stored in a warehouse prior to its reaching the place of destination.

This is the best conclusion I can come to on this branch of the case, the different clauses being exceedingly obscure and inconsistent.

On the last branch of the query, I am of opinion that in the license cases in

5 Howard, 504,

the majority of the Court in effect decide that it is within the power of the states virtually to annul the importation from other states of domestic liquor, by prohibiting its sale when landed in their limits, there being no existing regulation of Congress, special or general, to which such a regulation of internal traffic would be repugnant.

See opinion of Ch. J. Taney, 5 Howard, 586.
Catron, p. 608, 609.
And Nelson, J., concurring, p. 618.

And I think, therefore, that none such domestic imported liquor of American manufacture can be sold within this state.

Having arrived at this conclusion from the examination I have given the case in 5th Howard, and entertaining the views I have above expressed in reference to the exemption of foreign liquors, I am of the opinion that there is nothing in the clauses relating to the sale and importation of foreign and domestic liquors, thus construed, "repugnant to, or in conflict with, the section of the Constitution of the United States, whereby Congress is empowered to regulate commerce with foreign nations and among the several states and with the Indian tribes." And I therefore answer the fifth question in the negative, merely remarking, by way of addition in this place to what I have before said on the effect of the concluding words of section one, that if they are not to receive the construction I have given, the sale of foreign liquors is not prohibited; that "restricting the importer to sell only to persons authorized by the act to re-sell, as found in the twenty-second section," is a restriction against the constitutional right of the im-

porter to sell to any body and every body, as the right is laid down in the case of

Brown vs. the State of Maryland, 12 Wheaton, 419.

In reply to the seventh question: "Does section twenty-four repeal the power now vested in the Mayor, Aldermen, and Councilmen, for the wards respectively, as Excise Commissioners? If it does, is the power, as exercised by them, one which the Legislature is capable of withdrawing or curtailing?"

My views are in accordance with those expressed by the Counsel of the Corporation in his recent communication to that body on this subject, and I am of the opinion that whether the original right conferred by the Montgomerie charter be treated as a mere grant of political power, which is always subject to legislative action, or as lost by acquiescence in legislative interference, the result is the same, and that the Legislature possessed full power to repeal it altogether.

The answer to the sixth question: "Are any of the provisions of said act repugnant to the Constitution of the State of New York?" leads me to the conclusion that the law, in its spirit and mode of operation, is opposed not only to the provisions of our own Constitution, but to certain inalienable rights of person and property, which lie at the foundation of the social compact, and which no legislation can impair or destroy.

If I read the act aright, it not only undertakes to prohibit the sale of ardent spirits, as an article of general trade, but it makes the possession of the same, without even the intent to sell it, an offence punishable by crime and imprisonment; subjects it to confiscation and destruction, baptises it a public nuisance, restrains actions for injuries to it, or the collection of debts incurred in its sale; provides for the execution of a roving and inquisitorial process, issuing on mere suspicion, and limited only by magisterial discretion; and to crown the whole, violates a fundamental principle of law in applying to jurors under the act, a moral qualification hitherto unknown to the law and inapplicable to other cases.

No one recognizes more fully than myself, the evils of intemperance, and were the act confined to the legitimate and proper purpose of regulating the retail liquor traffic, there would be no one who would give it a heartier support than myself, or regret to be compelled to pronounce any of its provisions void; but "intemperate legislation is the great legal curse of the age," and defeats much good that might be done, by essaying to step beyond the constitutional bounds and legitimate scope of its authority.

Liquor is lawful property, a fact admitted in the law itself, and if not there conceded, one standing on too broad a platform of common sense and justice to be questioned or denied.

In the language of Mr. Justice Catron, "ardent spirits have been for ages, and now are, subjects of sale and lawful commerce, recognized as such by our treaties with foreign powers, and by the dealing in them among the states of this Union."

Legislative power has its limits, and on principle, in accordance with the fundamental maxims of a free government, is always inhibited from interference with, or attack on the rights of persons or property; and the framers of the Constitution, anticipating the evils which might flow from intemperate legislation, have jealously guarded these rights, by providing in the most explicit language, that "no person shall be deprived of life, liberty, or property, except by due process of law," which terms have acquired a distinct and definite meaning, and as judicially construed, form a perfect barrier against legislative encroachments on private rights, like the present act.

It is said, however, that in the exercise of its police power, the state may, and often does—as in the case of gunpowder and quarantine laws—destroy private property for the public good. The reason of this, however, is, that at the time such an authority is exercised, the subject is in itself, from its own intrinsic character, directly dangerous to life, or health, or in a position from which, by the operation of other causes, the like results might flow. Putrifying merchandise, stored in a warehouse, would be an illustration of the former, gunpowder of the latter view. The theory of the law on this subject, says Chief Justice Shaw in the case of

Fisher vs. McGirr, American Law Register, vol. 2, No. 8, p. 467,

seems to be this: "That property of which noxious and injurious use is made, shall be seized and confiscated, because either it is unlawfully used by the owner or person having the power of disposal, or by some person with whom he has placed and intrusted it, or that by his default it has fallen into the hands of those who have made and intend to make the noxious and injurious use of it, of which the public have a right to complain; and from which they have a right to be relieved.

"Therefore, as well to abate the nuisance as to punish the offender, the property may be forfeited or destroyed as the circumstances of the case may require and the wisdom of the Legislature direct."

Now, grating that it may be competent for the Legislature to provide, as a means of aiding in the enforcement of a prohibitory law, that liquor kept for sale should be a nuisance and liable to be destroyed, (which I deny,) it is impossible that the Legislature could constitutionally direct such power to be extended so as to embrace the case of liquor not intended for sale, but held in store for such purposes, other than sale, as the interest of the owner may suggest, such as waiting for the repeal or the modification of the law, or an opportunity of shipment to other states or countries.

Liquor is not in itself injurious to any person or thing, it is its improper use, or rather abuse—its consequential moral operation, rather than any direct physical effect—against which the policy of these laws undertakes to provide, and as a means of preventing

which, when it is intended to be a matter of traffic, the remedy of seizure is given.

But in the act under consideration that process extends to all that is "kept or deposited," without even limiting it to that which is kept for sale.

Such a provision, in my judgment, apart from all other considerations, renders the law unconstitutional in its application to liquor in that position.

There are other portions—such as the manner and method of seizure and search—provided by the sixth clause, the manner of trial of claims, the limitation on the qualification of jurors contained in the sixteenth clause, and of the right to maintain actions to recover the value or possession of liquor imposed by the sixteenth clause, equally objectionable and avoid. All of them have been, in the laws of other states, the subject of judical investigation, and held invalid; and it will, therefore, be sufficient for the present purpose to refer to some of the cases:

Green vs. Briggs, 1 Curtis, U, S. Circuit Court Reports, p. 336.
Fisher vs McGirr, Am. Law Register, vol. 2, No. 8, p. 466.
The Monthly Law Reporter, vol. 5, No. 9, p. 433.
Preston vs. Drew, vol. 5, ibid No. 4, p. 191.

In a word, my opinion is:

1.—That imported foreign liquors may be sold by any body, in any place within this state.

2.—That the seizure and destruction clauses are void, whether applicable to foreign or domestic liquors.

3.—That the act does not, in terms, prohibit the manufacture or exportation of domestic liquors, but that the practical operation of the seizure clause, if constitutional, would, in effect, destroy, the business of manufacturing.

4.—That as the seizure clause is void, liquors made in this state may be exported, and if not intended for sale, kept here without risk of destruction.

New York, April 24, 1855. JAMES W. GERARD.

OPINION OF THE

HON. SAMUEL BEARDSLEY,

ON THE PROHIBITORY LIQUOR LAW.

New York, May 8, 1855.

My opinion upon various questions arising on the recent Prohibitory Liquor Law having been asked, I have given to the subject that earnest care and attention which its character and importance so fully demand. The main design, in the enactment of this statute, may have been to eradicate or check admitted and great evils, which it cannot be denied that the mode adopted, if fully carried out, must lead to the sacrifice of an immense value of individual property, and reduce many from a condition of reasonable competency to that of comparative want. The anticipation of such results cannot fail to excite a deep feeling of hostility to the measure, and to arouse the strongest efforts to oppose its execution. These are natural and inevitable results, and while opposition is kept within the limits of the law of the land, no one has any right to object that it is unsuitable or improper. The act, too, draws in question the relative powers of the general and state governments, and may present a case where those powers are brought in conflict with each other, so too, the act, in all or some of its provisions, may violate the Constitution of this state. It is, therefore, in every aspect, a subject of the gravest character, and I have considered and reflected upon it as such. Of the policy of the act I have nothing to say, at this time. It may be thought in this, as in many other instances, that an excess of zeal, even in an effort to effect a great good, is not attended by the needful amount of discretion in adapting means to the desired end—but I shall confine myself strictly to the provisions of the act and their legal meaning and effect.

In examining this subject, the first inquiry would seem to be, whether a state of this Union has power to prohibit, totally or qualifiedly, the sale of spiritous liquors, and to enfore the observance of such a law in any manner; and the second, as to the validity of the measures provided in this act for its enforcement. I shall first examine the naked question of power, reserving what I have to say on the vindicatory part of the act for a separate consideration.

It is but reasonable to suppose that this act was intended to em-

brace three distinct classes of property, to each of which different laws may apply, and dissimilar rights exist.

For the first class, may be taken wines and other liquors, imported from foreign countries.

These are brought into the United States under the authority of the general government, and in conformity with various treaties and laws on the subject. The states have no power to prevent or impede the importation of property from foreign countries, for the treaty-making power is vested in the President and Senate of the United States, and Congress is expressly authorized "to regulate commerce with foreign nations."

Constitution of the United States, Art. 1., sect. 8, sub. 3.

This power has been exercised by Congress in the passage of laws, which provide for the introduction of liquors and other property, on the payment of certain duties to the United States. These treaties and laws are parts of the supreme law of the land.

Constitution, Art. 3.

The right to import is therefore conferred and secured by a law paramount to all state authority, and it carries with it a right, on the part of the importer, to sell what he has thus imported. This has been adjudged by the Supreme Court of the United States, and may be taken as a point entirely at rest.

Brown vs. the State of Maryland, 12 Wheat., R. 419.

But this right to sell, irrespective of, and even in hostility to, state authority, is limited to sales made of the import in the form and condition in which it may, by the law of the United States, be brought into the country. Dry goods may be sold in the original package, as wines may in cases, and other liquors in casks, for they may thus be imported under the laws which regulate foreign commerce. But when the import passes from the importer, as by sale to a customer, or is broken up for retail by the importer himself, it ceases to be any longer under the protection of the law of the U. S., and falls at once into the general mass of property within the state which is subject to the exclusive control of the state laws. Some very distingushed judges have held, that a state is competent to regulate and even prohibit the sale by importers of their original packages; but, notwithstanding these exceptional opinions, the right to sell all imports in that condition, may, as I think, be regarded as the settled law of the land. The authority of the state, however, is no further restricted by the paramount law of the United States, than is required to secure an absolute right on the part of the importers to make sales of their imports in that condition; far beyond this, a state may regulate, and even prohibit, the sale of imported property of every description, as fully as it may property of domestic growth or production.

Brown vs. the State of Maryland.
Supra the License cases, 5 How., S. C. United States, R. 504.

The second class of property, which it may be supposed the act was intended to embrace, is composed of liquors brought in from other states of the Union.

As Congress has power to regulate commerce "among the several states,"

Constitution, Art. 1, sec. 8, sub. 3,

the introduction of such property from one state into another may, unquestionably, be thus authorized, so that a state act, prohibiting its introduction would be of no force. Such a law of Congress would, as in respect to imports from foreign countries, confer a right to sell what was thus authorized to be carried from one state to another. But Congress, although authorized so to do, has not yet passed any law regulating commercial dealings among the states.

The License cases, *supra*, p. 578.

That power has not yet been exerted, and until it shall be, the several states of the Union will not have been deprived of their original power, as sovereign states, to prohibit the introduction from other states of such articles as may be thought injurious to the public welfare, or to regulate or prohibit their sales within the limits of the respective states. These principles will be found fully asserted and sustained in the cases above cited.

The third class of property referred to, is wines and other liquors of the growth or manufacture of this state, or which, being the production of some foreign country or other state of the Union, have been brought into this state and incorporated with the general mass of property within its limits, and which, as to sale and use, is subject to the exclusive control of state laws.

That a sovereign state has power to regulate the manufacture and production of whatever may be deemed noxious or adverse to the public interest, and that it may even prohibit such manufacture or production, will not, I suppose, be denied by any one. And as the state has power to prevent the manufacture or production of such articles within its limits, it may, undoubtedly, regulate or prohibit, totally or qualifiedly, their sale or consumption. These are but truism to which all will assent when looked at merely in reference to the question of power. Doubtless the public authorities of a state may act in such matters, as in others, unwisely, and in a manner which cannot fail to retard, if it do not defeat, the end in view, but this will not show, nor tend to show, that the state, as a sovereign power, may not do in these respects what shall, in its own view, seem best calculated to promote the public weal.

I have said that it may be supposed this act was intended to embrace the three classes of property to which reference has been made; and, if such is its effects, I have already vindicated, in a general way, my opinion of its vitality and force so far as respects the power of a state to regulate or prohibit the sale of such property, although the modes by which the prohibitory clauses of

this act are to be enforced present very different questions. That this act applies to wines and other liquors, brought in as articles of commerce from other states, and to such as are of domestic production, is clear enough. But the doubt is, whether the act, fairly construed, can be made to apply to wines and other liquors brought into the state as imports from foreign countries, and that question will now be examined.

There are but three prohibitory sections in the act—the first, third, and eighteenth—of which the last two have very little, if indeed any, significance in reference to the question in hand. The last section named relates to the transportion of liquor, and prohibits this being done, unless the package or cask in which it may be contained is marked in a particular manner. The third section prohibits persons licensed under said act from doing certain things, but contains nothing material now to be stated or considered.

But the important section is the first, for we there find the only prohibition in the act against the sale, keeping for sale, and giving away, or keeping to give away, of wines or other liquors.

1. As to their sale, or being kept for sale.—This can only be done by a person authorized as the act provides, and in the manner and for the purposes specified therein.

2. As to giving away wines or other liquors, or keeping them for that purpose—They can only be given away by physicians in their practice, or for sacramental purposes, nor can they be kept with intent to be given away in any place except a dwelling house, in which there is no tavern, &c. There is an express prohibition against keeping or depositing wines or other liquors in any place except such a dwelling house, "or in a church or place of worship, for sacramental purposes, or in a place where either some chemical, mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of its destination." Every violation of these provisions is declared by the act to be a misdemeanor, and subjects the offender to severe punishment, by forfeitures, fines, and imprisonment.

m Section 4.

That these prohibitions are wholly void as to importers, in reference to liquors in original packages, must follow from what has already been stated, if the principles applicable to property in that condition have not been mistaken. Importers may sell or keep to sell, may give away or keep to give away, and may deposit their imports wherever they can find a place for their reception, notwithstanding these prohibitions. Their rights in these respects are secured by constitutional acts of Congress, against which state legislation is powerless. This I should hold to be sound law, even if the prohibitions in the first section could be understood to apply to imported liquors. But this section at its

close has these words: "This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States." This is a broad exception, for it takes out of these prohibitions liquor of every description, the sale of which is authorized by the United States. By the law of the United States there is an absolute right to sell all liquors imported from foreign countries under the authority of that law; they are therefore, by the very words of the exception, excluded from every provision contained in said section. Looking outside of the act, it is probable the law makers did not intend to confine these prohibitions to domestic liquors. But the act is strongly in derogation of common right and of that freedom from external restraint which all men prize and desire to enjoy. The words of the exception are explicit, and in their ordinary, and indeed only signification, necessarily exclude imported liquors from the prohibitions in the first section. The words of the exception cannot be understood otherwise, and there is nothing in any other part of the act which can be made to abrogate or change their meaning. True, the eighteenth section may be said to regulate the transportation of foreign as well as domestic liquors; but this will not prove that their sale, keeping or giving away is prohibited. So of the twenty-second section, which declares that this act shall not be construed to prevent "the importer of foreign liquor from keeping or selling the same in the original packages to any person authorized by this act to sell such liquors." This section also declares that it shall not "be lawful to seize, sell, or destroy any liquors deposited or found in any bonded warehouse within the limits of this state, nor prevent any liquors imported into the United States from being taken from such bonded warehouse to any place beyond the limits of this state." These clauses it must be admitted, indicate that the Legislature supposed imported liquors fell within the provisions of the first section of the act, but they cannot be made to nullify an exception, explicit and plain in its terms which takes them out of that section, and which would be wholly senseless unless made to have that effect. If the exception does not mean this, it has no meaning at all.

These provisions of the twenty-second section may, with much more reason, be rejected as superfluous and nugatory, than to hold that this exception is void and of no effect whatever. Such, in my opinion, is the result at which every court would arrive.

As to the prohibitory provisions of the first section of this act, my conclusions are:

1. They are void so far as respects imported wines and other liquors, in the hands of importers while in the condition of imports, and he may keep or sell them in that condition, in entire disregard of every thing contained in the act.

This right is secured to the importer by the law of the United States.

2. The state has power to regulate, and may prohibit, the sale

of other liquors, and I see no ground on which the prohibitions in this act against the sale, keeping to sell, and giving away of such liquors, can be held in all respects invalid, although I do not intend to be understood that, on the other hand, they are all valid.

3. But the act by express words takes out of the prohibitory clauses of the first section all imported wines and other liquors, so that none of its provisions as to fines, seizure, and forfeiture, for violating said clauses, apply to this class of property. The act, therefore, does not really contain any prohibition against keeping, selling, or giving away imported liquors at the pleasure of the owner, nor can any such property be seized or confiscated under its authority.

I proceed to the vindicatory part of the act.

The act may do credit to the courage of its authors, for they have not hesitated to cast upon the lower grades of officers, judicial and ministerial, throughout the state, powers of the most novel, sweeping, and dangerous character. The execution of the act, so far as respects the judiciary, is committed, in a great degree, to Justices of the Peace and other subordinate magistrates, whose powers have hitherto been circumscribed within narrow limits and cautiously defined. But here, if this act can be upheld, their powers over personal liberty and fortune are, to a great extent, wholly unlimited. For aught I see, a Justice of the Peace may, under section eleven, impose a fine from ten dollars up to any other sum, however great, for which, in default of payment, the person fined may be imprisoned one day for each dollar of the fine.

Section 11, 4.

This is a power which no man should possess, and to the exercise of which no people fit to be called free would be likely to submit. But happily, the Constitution declares that excessive fines shall not be "imposed, nor shall cruel or unusual punishments be inflicted,"

Article 1, sec. 5,

so that there is but little danger to be apprehended from this attempt to establish an unlimited power to fine and imprison.

But this is not all which goes to show the recklessness with which power has been lavished upon inferior magistrates and officers. The act gives to these magistrates the power to adjudge, on various grounds, heavy fines and imprisonment for long periods,

Section 5,

the conviction, upon which such fines and imprisonment are adjudged, constituting a ground for the forfeiture of property to any amount whatever, if kept by the person convicted in violation of the first section of the act. So, too, the search, seizure and destructive powers of these magistrates are not limited by the amount of property proceeded against, but to them is

committed authority to adjudge forfeiture and destruction without regard to quantity and value.

Sec. 6, 7, 13, 10.

The same authority which can order the destruction of ten dollars worth of property, may be exercised where the value is ten or a hundred thousand dollars. Sheriffs, constables, marshals, and police men, are required to arrest all persons whom they "shall see actually engaged in the commission of any offence in violation of the first section of this act, and to seize all liquors kept in violation of said section, at the time and place of the commission of such offence." These provisions show with what a lavish hand these despotic powers have been granted, and how utterly regardless of consequences were they who ventured to invest subordinate, and not unfrequently irresponsible officers with powers so extensive and arbitrary, and in their nature so greatly liable to be abused. It may be that the people of this state will be able to pass through this struggle without the sacrifice of any great interest, or the perpetration of any great wrong; but there is much room to apprehend that in this state, or elsewhere, we shall hear of acts of violence, if not bloodshed.

Let us examine a little more closely some of the punitory provisions of the act. It assumes to authorize, in a summary way, by proceedings before Justices of the Peace and other magistrates,

Section 6,

the seizure, confiscation, and destruction of all liquor kept or deposited in violation of any of the provisons of the first section; and I will inquire whether these provisions are compatible with the Constituion of this state. If they violate that instrument, which is a law to the Legislature, they are no doubt to that extent wholly void.

The Constitution declares that "the legislative power of this state shall be vested in a Senate and Assemby.

Article 3, sec. 1.

Here is no limitation, and the clause in its comprehensive terms, if left free from restriction, would invest the Legislature with all such powers of legislation as a sovereign state can rightfully possess. But the legislative power of this state is in various particulars restricted by the Constitution, treaties and laws of the United States, as the power of the Legislature is further restricted by the state Constitution. That instrument declares in sententious and emphatic terms that no person shall "be deprived of life, liberty, or property, without due process of law."

Article 1, sec. 6.

This binds the Legislature, and divests it of all power to deprive any person, however humble or sinful he may be, of his property, except by "due process of law." Such a restraint upon the mad fury of factions, and the scarcely less dangerous zeal

of over-heated fanatics, is above all price, and it is the solemn duty of all courts to give it full effect. Life, liberty, and property, can in this way only be preserved from unbridled violence.

This clause of the Constitution has especial reference to criminal proceedings, and those now under consideration are of that character.

Green vs. Briggs, 1 Curtis' Rep. 311.

The phrase "due process of law," as to such proceedings, requires that the facts which constitute the offence alleged to have been committed, and the intent, where that is a material ingredient of the crime, should be duly set forth and charged against the supposed offender. We have a statute of the state which declares that "in all criminal prosecution, the accused has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor."

R. S. 94, sec. 14.

This, to be sure, is but a statute, and may be repealed by the Legislature, but there is nothing in the act in question which looks like an intention to repeal it, although there was an obvious design to evade its requirements. The spirit and substance of the requirement are above the reach of the Legislature, for the constitutional guaranty given by the words, "due process of law," extends to and secures everything expressly declared in the section of the statute which has been copied. That section is only declaratory of what is embraced within the terms "due process of law." It is the office of an indictment, in the higher grade of crimes, to inform the accused of "the nature and cause of the accusation," and the same should be done by a complaint in the prosecution of minor offences. Great strictness is required in an indictment that the party may be fully apprised of what is alleged against him.

A complaint may be less formal than an indictment and still be good, but in matter of substance, it should contain a distinct statement of the criminal act and intent which constitute the alleged offence. Without this there can be no "due process of law," for without it the accused is not informed, as he always should be, of the particular offence alleged against him. This clause, also, requires that the supposed offender should be brought into court to answer for the offence, or he should be allowed an opportunity, after due notice, to meet the charge made, and, if denied by him, its truth or falsity should be determined by a jury according to the course of the common law. There must be such a complaint and such a trial, or an opportunity for one, before a person can be constitutionally deprived of life, liberty, or property, by any such proceeding. All will agree that this must be so as to life and liberty; and this saving clause of the constitution is equally con-

trolling for the preservation of property. Life, liberty, and property are protected by the same constitutional shield: "due process of law."

Green vs. Driggs, *supra*, Taylor vs. Porter, 4 Hill 130, 2 Kent, 6th ed. 13, and note 6, 3 Story's Com. on the Constitution, page 661.

Fisher vs. McGirr, 6 Law Reporter, new series 622, and the next two cases following in the vol.

Such are the undoubted rights of every person in this state, and of which he cannot be deprived while the Constitution remains as it now is. But these requirements of the Constitution are violated in the most vital parts by the confiscation provisions of this act.

The offence for which liquor may be seized under a warrant from a magistrate, and be finally destroyed by his order, is, that it is kept or deposited in a wrong place, or with a wrong intent, as specified in the first section

Section 6.

The act of keeping or depositing the liquor must, necessarily, be the act of some person, and it must be accompanied and qualified by his illegal intent where that makes the act, otherwise innocent, a crime. The offence for which the liquor may be seized, as provided in the sixth section, is the simple act of keeping or depositing it in a wrong place, or there is superadded the intent to sell or give away said liquor. These constitutes the ground for a seizure and ultimate destruction of the property. But this is the offence of some person, and not of the property, for mere inert matter can in no way violate the law, although it may be an instrument in such violation by the person who keeps or uses it. As the offence is personal, the guilt of the offender must be established by "due process of law," before the owner can, lawfully, be deprived of his property. But this act, in assuming to authorize the seizure and confiscation of liquor, thus kept or deposited, plainly violates this saving provision of the Constitution.

1.—The act does not require, in order to authorize such seizure and confiscation, that a complaint or charge, setting forth the facts which constitute the alleged offence should be made against any person whatever. All the act requires is that a complaint on oath or affirmation, in writing, should be made by one or more credible persons, "that he or they have reason to believe, and do believe, that intoxicating liquor is kept or deposited in violation of any provision of section first of the act, whether the person so keeping or depositing the same is or is not known to the complainant, in some specific place or places," &c., which complaint shall state the facts and circumstances upon which such belief is founded, &c.

Section 6.

If the magistrate is thus satisfied, that there is probable cause, nothing more being required for said belief, he is to issue his warrant to search the place and places named, and seize "all

intoxicating liquor found therein, which, from said complaint or other proof," said magistrate shall be satisfied there is probable cause for believing is kept or deposited in violation of any provision of section one.

This warrant is to be issued, although no proof is furnished of the guilty person, but if he is made known to the magistrate, a separate warrant is to be issued for his arrest; not, however, that he may resist the condemnation of the property, but "to be dealt with personally, according to the provisions of this act."

Section 6.

This means that he is to be tried for his personal offence under section five; and if convicted he may be fined and imprisoned under section four. Such conviction, as the last section declares, works a forfeiture of all the liquor kept by the person so convicted, in violation of the first section of the act.

Section 4.

But we will suppose there has been no arrest of the persons so keeping or depositing the liquor, and that the warrant authorizing its seizure has been executed, and the liquor stored "in some safe and convenient place, to be disposed of as" provided by said act.

Section 6.

So far this is purely a proceeding *in rem.*, irrespective of any person whatever. There is no complaint against any person for a violation of the act, nor does it require that in every case the owner of the liquor, or some one else, should be made a party to the prosecution against the liquor seized. But the design of the proceeding is to effect the forfeiture and destruction of the property; and justice demands that the owner or other person, who was in charge of it, should be brought in or duly notified to defend said property.

This is but sheer justice, and without it there can be nothing like "due process of law" in such a case. But the act in this proceeding does not require a complaint against the offender or his arrests, nor does it provide with any thing like reasonable certainty that shall have notice of what is going on. True, there is provision for a "written notice to the owner or his agent, if known" to the officer who made the seizure, and which is to be served "personally, or by leaving the same at his last or usual place of business, with a person of mature age, residing on the premises. If the owner or his agent cannot be found, and his place of residence is not known to the officer, such notice shall be served by delivering the same to any person of mature age, residing or being employed in the place in which such liquor was contained; if none such can be found, by posting the same on the outer door of such places; and copies of such notice containing also a description of the place in which such liquor was

found, shall forthwith be conspicuously posted in at least three public places within said city or town."

Section 7.

This section seems not to require any notice where the owner or his agent is unknown to the seizing officer. But let it be conceded that the owner or agent will usually be apprised of the seizure in some way, he still has no notice to appear and defend, the statute only requiring notice of said seizure and of the name of the magistrate by whom the warrant was issued.

Section 7.

Nor is he allowed to appear and make defence of any sort, unless he will present the said magistrate "an affidavit or affirmation, in writing, stating that such liquor, at the time of such seizure, was actually owned by him, or by some other person named by him, for whom he is agent; that he or such person had not become possessed thereof for the purpose of preventing its forfeiture, and that the same had not been kept contrary to the provisions of this act, to the best of his knowledge and belief; and also specifying the purpose for which the place where, under which exception of section first, the same was kept, and the facts particularly showing it to be within the exception."

Section 7.

Now, it is hardly worth the trouble to inquire whether, on presenting such an affidavit, the owner or agent may have the truth of his claim tried by the magistrate and a jury, or may have the truth of the complaint against the liquor determined in the same way, for the act forbids any trial whatever, unless such an affidavit is made and presented; and, of course, no defence being made, the liquor will in due time be condemned and destroyed.

Section 13, 10.

This provision, requiring an affidavit of innocence to be made before a party can be allowed to make defence in a criminal proceeding against person or property, is remarkable in its nature, and, I believe, wholly unprecedented. By our law—and common charity should teach us the same lesson—every one is taken to be innocent until proved to be guilty; and that when charged with crime he has an absolute right, without swearing to his innocence, to put in a denial, and call upon the accuser for proof of his guilt. This is equally the right of the accused, whether the conviction may result in the loss of life, liberty, or property; for no one can be deprived of either without "due process of law." The Legislature might as well provide that no person charged with murder, should be allowed to plead not guilty, unless he would swear to his innocence, as to exact the affidavit required by this act, before an owner can be allowed to make defence against the forfeiture and destruction of his property. But the Legislature has no such power, and every seizure under the pro-

visions of this act which have been referred to, will make both the magistrate and officer serving his warrant responsible to the owner as tresspasser, for depriving him of his property without legal authority.

The act abolishes some of the most settled and reasonable rules of evidence, and the design, there is great reason to believe, was, if possible, to secure the conviction and the sacrifice of the property of every suspected person. There must be some limit to legislative power in this respect, or the right to a "trial" and to "be confronted with the witnesses against him," is but a name, and the cermony an idle farce. "Due process of law" requires that the person on trial should be presumed innocent until his guilt is established; that his guilt should be proved—not declared by a statute. It therefore denies to the Legislature power to make rules of evidence which will, in substance, leave nothing to be tried. The exercise of such power by the Legislature may as effectually destroy the right to a "trial" as it would be by abolishing a trial in form. The substance would be gone, and the mere form would be worse than idle and useless.

There are other parts of the act open to great objections, but those which have been adverted to may be taken as samples of the residue, and are quite sufficient to disclose the means by which it was to be carried into effect.

SAMUEL BEARDSLEY.

OPINION OF

DANIEL LORD, ESQ.,

ON THE PROHIBITORY LIQUOR LAW.

In examining the Act "for the prevention of intemperance, pauperism, and crime," the first inquiry presented is as to the exception made in the first section.

By this section, intoxicating liquor, (including by section twenty-second, alcohol, distilled and malt liquors, and all liquors that can intoxicate, and all drugged and mixed liquors of the above descriptions,) is forbidden to be sold, or kept for sale, or to be given away, or to be stored or deposited, except in a dwelling-house, or place of worship, for sacramental purposes, or place where some chemical, medicinal, or mechanical art requiring the use of such liquor is carried on as a regular business, or in the actual transportation from one place to another, or by physicians as a medicine.

This section excludes, therefore, all keeping of liquor for any but the excepted purposes, and does not allow of its being sold or kept as a common or free branch of trade. To this is subjoined a clause "that this" section shall not apply to liquor, the "right to sell which in this state is given" by any law or treaty of the United States.

It is decided that liquors imported and on which duties are payable may be sold by the importers, and in the packages of original importion, by virtue of the Constitution and laws of the United States, but so far as that Constitution and those laws bear on this subject, the sale of liquors not thus imported or not thus in original packages, is the subject of state legislation.

5 Howard R., 540; the License cases.

It was competent, therefore, so far as the Constitution and laws of the United States are taken into view, for this state to prohibit the traffic in liquors not within the above privilege, if the state chose so to do. The question, therefore, as to this particular exception, is one simply of construction of this state statute. That construction must be made, not from mere popular supposition, but upon settled principles applicable to all legislative acts. Primarily the express and grammatical meaning of the law is to be looked at, *and certainly it is the liquor which is thus excepted*, neither the mode of keeping as to quantity, nor the person keeping

it, nor the place of keeping it, are alluded to; but the liquor itself so imported is excepted. The law is highly penal, and deviates greatly from the ordinary rules and principles of the common law. Such laws are to be limited in their construction, and not to be enlarged by inference. This exception, however, on the other hand, must be looked at in connexion with the other parts of the law; one section of which shows a broad design of general prohibition by creating the trade itself a public nuisance, and it presents a very difficult question of legal interpretation, on which an opinion cannot be surely relied on, until sanctioned by judicial decision, if such provision be valid.

But there is a much broader question involved in this law, by which the validity of the whole may be determined, and the effect of this exception becomes much less important.

By the first section, the ordinary business of a dealer in malt and distilled liquors, as hitherto from the earliest periods, lawfully pursued, is forbidden.

By the fourth section, the trade is made a misdemeanor in the person conducting it—is punished by a forfeiture of all the liquor kept and by fine. By the sixth section, the probable suspicion of the misdemeanor warrants a search of the place and an arrest of the suspected party. By the seventh section no owner can make a claim to the seized property, without an oath, that he has not violated the law. By the tenth section, the liquor seized, if not acquitted, is to be destroyed.

By the fourteenth section, the person found to have violated the act, is disqualified from being a juror on any question to be tried under it. By the seventeenth section, any sale is presumed evidence of unlawful sale; and the accused cannot defend himself without a preliminary oath of innocence; and last and principally, by section twenty-fifth, "*all liquor kept in violation of any provision of the law is declared a public nuisance.*"

This series of provisions is undeniably very extraordinary. They are great innovations on the common law as to the offence created, the mode of trial, and the effect of the proceedings; and if applied generally to other offences, would leave scarcely a shadow of the common law protection to an accused.

By declaring the liquor kept contrary to this law *a public nuisance*, its destruction is made lawful to any one responsible or irresponsible, who will assume the burden of justifying his violence. By precluding a claimant from his claim without his oath of innocence, he is made to accuse himself by his silence, or foreswear himself, or forfeit his property. By the terms of the law, guilt is presumed in every sale instead of innocence; and the jury is itself packed by a new and solitary disqualification. If these provisions and consequences are proper in the case of one kind of misdemeanor, we must look for their extension generally, and the ordinary safeguards of all accused persons will be swept away. It becomes, therefore, a question wide in its bearing,

whether the legislative body is intrusted with such power. That which is to-day applied to malt liquors, may be applied to-morrow to tobacco, which may be also declared a public nuisance. The sale or keeping for sale of costly apparel, may be next made to enter into the same class. The existence of property in large masses may follow. A mortgage may be declared a public nuisance. The occupation of brokers, lawyers, physicians, may be a sectarian meeting, (permitted as a free exercise of religion in a private dwelling,) may be declared a nuisance in a place open to the public; and if there be such a power in the Legislature, that body is substantially unlimited in its power on the citizen.

The question then is fairly presented, *whether the Legislature of this state have the power to convert a trade, or a subject into a public nuisance, with all its forfeitures and disqualifications, by the simple declaration that it is so.* In other words, if, by the common law of the country, existing at the date of the Constitution, and immemoriably before, a trade or an article was not a nuisance, and there has been no change in relation to the trade or article, altering its character, is it competent for the Legislature by its mere declaration to make it a nuisance? If the trade of a cooper or armorer has lawfully existed since society began, can our Legislature, under the notion that if there are no casks there will be no liquors, if no makers of arms there will be no murders by their means; make those trades a public nuisance by merely declaring them so to be? By the form of our institutions the Legislature represents pluralities, not majorities, nor by any necessity a majority of the people. It may be, and sometimes is, the representation of a minority of the people, by reason of the fact, that small but numerous pluralities on the one side overpower the less numerous greater majorities on the other. For this and for the other more weighty reasons, the legislative power in this state is controlled by fixed and numerous limitations, in that respect differing from the English Parliament. It is, except when so limited, the great reservoir of power, and it is the body alone capable in this state of a tyranical and violent oppression.

The first article of the Constitution is, as its corner stone declares, "*The rights of the people.*" It secures these common rights from legislative interference as much as any provision in the instrument secures any other rights. By the first section, "*no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.*"

By the sixth section, "*no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.*" This last clause was first introduced into the Constitution of 1822, from the Bill of Rights.

These are limitations of the legislative power as much as of every other organized power in the state. They are provisions

in favor of acknowledged rights. They are the protections equally of social, political, and personal liberty, and of private property. They are to be largely and liberally expounded; they are derived from Magna Charta, and are in modern but broader language, *repetitions* of its most important provisions.

What then is *the* liberty meant in the Constitution? Is it mere absence of imprisonment, or does it reach to some protection in the employments of freemen? Does it in any degree reach liberty of action, freedom of industry? Freedom to earn a support by the ordinary and long recognized modes of industry and liberty is the term of the common law, as such it appears in Magna Charta. To that, and the early commentaries on it, we are to look for light as to the true import of these provisions adapted from it. In examining this great statute with the commentary of Lord Coke on it, the protection to the free exercise of trade is as evident as any of its principles. In commenting on this section relating to life, liberty, and property,

Ch. 29, 2 inst., 47.

speaking of "liberties," Lord Coke says, "it signifieth the freedom that the subjects of England have. For example, the company of merchant tailors of England having power by their charter to make ordinances, make an ordinance that every brother of the same society should put the one half of his cloths to be dressed by some clothworker of the same company on pain of forfeiting ten shillings, it was adjudged that this ordinance was against law, *because it was against the liberty of the subject*, for every subject hath freedom to put his cloths to be dressed by whom he will—*et sic de similibus.*"

So, likewise, if a grant be made "to any man of the sole making of cards, or the sole dealing with any other trade, that grant *is against the liberty and freedom of the subject that before did, or lawfully might have used that trade, and consequently against this Great Charter.* Generally all monopolies are against this Great Charter, because they are *against the liberty and freedom of the subject* and the law of the land.

The great commentator in the same chapter treats of the other things protected, life and property.

It thus appears that when life, liberty, and property are spoken of in view of their protection, the ordinary trades and occupations by which property is acquired, life supported and industry favored, are equally taken into view. Of what avail would a theoretical liberty be if the occupations of men, practiced and sanctioned from their earliest union in society, were to be pursued only at the mere discretion of the sovereign power? How capricious the provision which would protect an acre of land, and leave unprotected from despotism a business made valuable by years of industry, and entered upon with the sanction of immemorial usage? It is, therefore, a sound construction, both on principle and on authority, that the clause of our state Constitution—hold-

ing its protection over life, liberty, and property, includes in its safeguard the established and usual trades and occupations of men; and that if life or property are protected from capricious and tyrannical legislation, such pursuits of industry are equally so.

What is meant by *due process of law?* Is a law declaring an act, which has been beyond the reach of memory held innocent, and which has undergone no change in its character, a crime, is it *due process of law?* If it is, the whole provision of the Constitution as a limit on the Legislature is idle. If their mere declaration is *due process of law*, they can do any thing. They may declare a man a felon, and by such *due process of law* he is so. They may proscribe a body of men, a trade, by declaring their work a nuisance. They may take his land or goods by a legal confiscation, and this also would be *due process of law.* This cannot be; nor does due process of law merely relate to mode of trial, although doubtless it does embrace those principles as to accusation, mode of evidence and trial, which are by the common law in criminal cases the protection of the accused. He must be informed of the charge, and be permitted freely to answer it. He must be subjected to no arbitrary modes of proof. He must have a fair trial. But all these would be a slight protection if the sovereign power could create offences upon ground new and before unknown. The citations from Lord Coke, show that not only modes of proceedings in courts, but modes of industry and trade in common life, are within this great protecting principle, and in my judgment, all the substantial principles protecting life, liberty, (including the use of trades always before held lawful,) and property, recognized by the common law, are made sacred by the Constitution of our state, against mere arbitrary legislation.

It is by no means true, that the Legislature may not modify *in circumstance* and *in form*, any common law proceedings relating to life, liberty, and property; but they cannot impair it in *its substance* or essential part. They may apply an old principle to new cases. They may under a change of circumstances by which acts once harmless have become hurtful, make them crimes. But they cannot in a mere change of opinion in themselves, violate an old liberty, make an act, always before deemed innocent and confessedly unchanged, a crime, and visit it with forfeiture or infamy. In analogy to the provision in the Constitution of the United States as to contracts, states may modify remedies, but may not impair the substantials of an obligation; so under the limitations we are considering, the Legislature may change matters of form and apply old principles to new cases; they cannot substantially destroy or impair old principles which concern life, liberty, or property.

The Legislature, in passing any law, are supposed to consider the constitutional restriction on their own power. But their action is not conclusive. If it were, the restriction would be nugatory, and never could avail. The matter is open until disposed

of by the ultimate constitutional arbiter, the Judiciary, and as laws are presumed to rest not on the personal and private notion of individuals, but upon the public facts, the public condition and changes in society, these are evidently as much within judicial knowledge and cognizance as within legislative. On such knowledge the Judiciary always act in expounding a new law, they look at the open public mischief for which the proposed law is devised.

Is, then, the keeping of liquor for sale a nuisance by the common law, or has it been so since the date of Magna Charta? It curiously appears that the twenty-fifth chapter of that act provides, "one measure of *wine* shall be through our realm, and one measure of *ale*, and one measure of corn," &c. It is of undeniable notoriety that the sale of malt and distilled liquors has for ages been part of the trade of the world, lawful and every way recognized. It has undergone no change in its effects or consequences. Every reason for calling it a nuisance which exists now, existed hundreds of years ago. If it can now be declared a nuisance, so may any thing, so far as the acceptation and practice of society is considered to legalize it; and yet these are the bases of our common rights. To create it now a nuisance or a misdemeanor, is *not* applying an old principle to a new case, nor making a change, in any sense, of mere form and circumstance. It is violating the modes of industry of vast numbers, who have had the sanction of time, usage, law, and the universal consent of the world.

For the abuses arising from the sale of liquor, when they occur, the law has always provided remedies, preventive and consequential. They are warranted by the principles of the common law. But to create the trade itself a nuisance, without any of the circumstances which the law has ever before treated as an abuse, *is mere despotic legislation, and unwarranted by the Constitution of this state.*

It also seems to me, upon similar principles, that the monopoly in effect of the sale of liquor is objectionable.

The provisions preventing a man charged with an offence from claiming his property, without an oath as to his guilt or innocence, is compelling him to accuse himself, in violation of a substantial principle of liberty, protected by the above provisions of the Constitution.

The provisions of the revenue laws bear no analogy to cases of this kind. In regulating the admission of persons or goods from abroad, before they become part of the population or business of the country, the revenue power is unlimited, and may subject them to any conditions, however arbitrary. Revenue laws have always been most arbitrary.

In my opinion, *the law, in its main features, is invalid as an invasion of the Constitution.* It is therefore needless to criticise its special defects.

DANIEL LORD.

New York, May 22, 1855.

OPINION OF

JAMES R. WHITING, ESQ.

ON THE PROHIBITORY LIQUOR LAW.

The right of an individual to manufacture and sell intoxicating liquor, as an article of commerce and merchandise, cannot be questioned. It is a common inherent right. This right may be regulated or taxed by an excise duty imposed by Congress, but not by the states.

Article one, section eight, sub-division one, of the Constitution of the United States, declares that Congress shall have power "to lay and collect taxes, duties, imposts, and excises; but all duties and excises shall be uniform throughout the United States." The power of imposing taxes, other than on imports, exports, and excises, the states possess concurrently with Congress; but the states have no power to lay imposts or excises. If they had this power, the uniformity could not be maintained. The power conferred upon Congress, as to excises as well as imposts, is for this reason essentially exclusive. An excise duty is a specific tax upon the article, and when in its liquid form upon its measurement, whether it be an article of import, export, or to be consumed at home.

This rule of exclusive interpretation, in regard to the delegation of power upon Congress under the Constitution of the United States, has been adopted in regard to the judical power conferred upon the courts of the United States. The Constitution declares that the judicial power shall extend to all cases affecting ambassadors and consuls, and that in those cases, "the Supreme Court shall have original jurisdiction." Under this provision, the Supreme Court of the United States has decided, that the state courts have no jurisdiction over consuls, the power conferred being essentially exclusive. So in regard to that section, (thirty-four,) to establish an "uniform" rule of naturalization and "uniform" laws on the subject of bankruptcies; the uniformity of the rules in these cases is held to render the power conferred necessarily exclusive. No more uniformity is required in regard to these latter powers than in the levy and collection of duties, imposts, and excises—the uniformity required in all those cases being the same. Hence, probably, arises the fact, that in this state no excise law, at least in regard to strong or intoxicating liquor, has ever been passed by the Legislature.

Although the statutes of our state regulating the sale of liquor are denominated excise laws, they are really nothing more than license laws. This distinction existed in England when the wine licenses were a breach of the king's revenue, and were settled on the crown in the twelfth year of the reign of Charles the second, and, together with the hereditary excise, made up the equivalent in value for the losses sustained by the prerogative in the abolition of military tenures, and belonged to the ordinary revenues of the king. The excise, as a separate and distinct duty, was imposed by Parliament, and given to the king as a part of his extraordinary revenue. Our former statutes, as police regulations, affected to regulate the sale of strong or spirituous liquors by retail, through the instrumentality of a license, this being a power not delegated to the United States by the Constitution, nor by it prohibited to the states. They were not laws of prohibition, nor of revenue. They neither touched the manufacturer, importer, nor wholesale dealer. Between imported and domestic liquors they made no distinction—these articles being alike under the control and protection of the same system.

Indeed, the Massachusetts acts are entitled, one, "The regulation of licensed houses;" the other, "An act concerning licensed houses and the sale of intoxicating liquors." They regulated the sale,—they provided what they professed to call a license system—they were internal police regulations, and were so treated in the celebrated case in fifth Howard, and are there called "the License cases." Our laws were simply internal police regulations, intended to restrain the indiscriminate sale of liquor, and to control and modify the evils arising from intemperance. Thus stood the law on the ninth of April, 1855, when the law in question was passed. Passing for the present all question of power under the Constitution, let us examine some of the provisions of this new act.

Its purview and declared intent is to prevent the sale of intoxicating liquor "to be used as a beverage." It strikes at the "use." It is neither a license nor an excise law. It abolishes licenses. It authorizes an agency "to sell" intoxicating liquor, to be used for any purpose save "one." It is composed of twenty-six sections. The twenty-fifth was born on the day of its travail. The second section came into operative existence on the first day of May, just three weeks after, and the balance of it is to have vitality on the fourth day of July next. Such a labored birth the Legislature seemed to think befitting such a hydra-headed monster. It is then to come into the full stature and proportions of a law for the government of a free, and, it is to be hoped, a law-loving and a law-abiding people. Its full advent is to cast its dark and foreboding shadows over the state on its natal day, when the shackles of a similar despotism were sundered; when the political equality of men was declared; when life, liberty, and the pursuit of happiness were declared to be among the inalienable rights of men; when it was declared that a long train of

abuses and usurpations, evincing a design to reduce men under the sway of absolute despotism, transformed into a duty the right to throw off such a government and to provide new safeguards for their future security.

Then is to be proclaimed, in the streets and upon the housetops, from the pulpit, the press, and the playhouse, a new edict denying to the citizens of this state the privileges and immunities, secured to citizens in other states—unbarring our doors, and inviting the spy, informer, and petty constable to come in; exposing our families, our houses and effects to the rude search of the intruder; then and there is our property to be taken from us without a trial—without being informed of the nature of the accusation—without being confronted with the witnesses; then and there we may be arrested by warrant, dragged before a justice, and excessive fines and forfeitures inflicted. May not every peaceful citizen, who has not permitted his zeal to outrun his judgment, well pause and consider whether these evils, so introduced, will not, in their consequences, far outweigh all the evils which this law proposes to remedy? The day that ushers it in, is truly fitting for its contemplation; and if it can stand upon its own ill-proportioned limbs, and the test of constitutional limits, then let it stand; if not, then the destruction of human hopes in the establishment of a well regulated liberty, has not yet been begun.

What, then, are its provisions by which it can stand without constitutional impeachment?

The twenty-fifth section abolishes the whole license system, and declares all liquor kept in violation of the act, a public nuisance. The second section provides an agency to sell intoxicating liquor "for mechanical, chemical, and medicinal purposes, and for sacramental use." The act in terms, make the "sale," or "keeping for sale," or "keeping with intent to be sold," except under this new agency, and except such liquor the right to sell which in this state is given by any law or treaty of the United States, a public nuisance. No sales of the prohibited liquor can be lawfully made, nor can it be kept with intent to be sold, except under the new system, after the first day of May.

May not intoxicating liquor be sold or kept for sale, without a license, or agency, under the act, between the first of May and the fourth of July, without incurring a penalty? I think it may, because no penalty attaches until then. The twenty-fifth section declares all liquors kept in violation of this act, to be a public nuisance. The first section declares that no intoxicating liquor shall be so kept for sale. Does the twenty-fifth section draw to, and incorporate in it, the provision of the first, and make the provision operative before July? No, for the reason that the first section has no vitality until the fourth of July. The act so declares. There is, therefore, no penalty for selling without a license under this act until then. The former act gives the

penalty for selling without having a license therefor granted as therein directed. To sell "metheglin, current wine, or cider," without a license, is no offence under that act—by this it is. Under that, any strong or spirituous liquor may be sold to be drank in the house, or carried away and used as a beverage—by this it cannot be. The penalties now in existence are provided for violating *that* act, not for violating *this*. A sale of the cider and wines above enumerated is no offence under *that* act—under *this* it is.

It is essential to the idea of a law, that it be attended with a sanction, or in other words, a penalty or punishment for disobedience. I am aware that the doing an act prohibited by statute is declared to be a misdemeanor. It is made so by

Second Revised Statutes, third edition, 784, section 55.

It is made punishable, however, only in cases where the statute itself, or some other statute, has failed to impose the penalty. This statute does impose the penalty, and fixes the time for its infliction, and therefore it is not a punishable offence to sell or to keep liquor for sale during the time stated. Again, no penalty attaches, because the former acts are repealed by this by implication. This act is an affirmative act, in derogation of the common law. The sale of liquor was not prohibited at common law. Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto. This is contrary on the subject of license and sale. It forbids both. It does not regulate—it prohibits. No tax is imposed on the article or the right to sell; no consumption can take place except for chemical, mechanical, medicinal, or theological purposes. The penalties are different—new and unusual punishments are inflicted; no discretion is lodged any where as to the grant of a right to sell. Any person who can comply with the terms of the act, (and they will be few, if any,) can sell. The acts are repugnant, and cannot stand together; they are not only repugnant but in direct conflict.

It was held by Lord Mansfield, that the

Statute 5, Geo. 1, c. 27.

which inflicted a fine of £100 and three months imprisonment on such persons as should be convicted of seducing artificers, was by the

Act of 23, Geo. 2, c. 13.

which inflicted a penalty of £500 and twelve months imprisonment, repealed by implication. The same doctrine has been affirmed in the courts of our own country. The old law gave a penalty of $25; this gives a penalty of $50, and forfeits the liquor. The common law does not favor repeal by implication; but, when the repugnance is quite plain, or the powers or prohibitions are wholly inconsistent, or when they cannot be reconciled, or where there is a total difference between two statutes relating

to the same subject, the former acts are thereby repealed. It will require a new system of legal hermeneutics to give the new statute, by construction, the efficacy contended for by its advocates.

This act is also highly penal, and must be strictly construed. For its transgression, a forfeiture is incurred of money, liberty, and liquor. It is, therefore, in no sense remedial. The ordinary rules of interpretation, applied to remedial statutes, do not apply to this. A remedial act is made to supply the defects discovered in the common law, whether they arise from its imperfection or from lapse of time or change of circumstance—from unadvised determinations or other causes. It enlarges the common law when found too narrow, or restrains it when found too luxuriant. Penal statutes receive a strict construction or interpretation. The general words are restrained from the benefit of him upon whom the penalty is inflicted. They cannot be extended by construction. No American law recognizes constructive offences, or arbitrary punishments, or makes offences by interpretation. The statute must be its own interpreter. No penalty can be inflicted, unless the act which subjects the person to it is clearly both within the spirit and the letter of the statute. If these rules are violated, says an able English judge, "the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority contained in the laws."

Again, statutes made for the regulation of trade and commerce, or to regulate the conduct of merchants, or to prohibit and destroy their business, ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of this sort, the Legislature would be laying a snare for the people, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, when clauses are obscure, lean against forfeitures, leaving it to the Legislature to correct the evil. A statute derogatory to private right, or conferring new and extraordinary powers, of a special nature, upon particular persons, affecting the property of individuals, or giving a new penal remedy, or creating a new jurisdiction, or to cut down, abridge, or restrain the liberty of the citizen, contrary to natural justice and equity, or productive of practical inconvenience to the community, must be in clear and unambiguous language.

Although a statute, like a tyrant when he comes, makes all void, yet, thanks to the Constitution and the common law, "the one curbs his tyranny and controls his power, whilst the other, like a nursing father, makes void where the fault is." Such a correction of evils and of oppression, is not an exercise of legislative, but of pure judicial power. If the act had simply forbidden a sale, and provided no penalty, it would have been an indictable offence to violate the act, but having provided a mode of punishment, that, and no other, can be resorted to. I am of opinion, for the reasons stated, that no penalty attaches for selling

liquor without a license, between this time and the fourth day of July next. Sales made on Sunday are prohibited by another statute, which I believe to be still in force.

What liquor comes under the ban after the fourth day of July? Imported liquor is saved from it. Any person, for aught I see, may keep it any where, and sell it for any purpose. The restraints of the former law as to license, and the objects of its use, are taken away. The twenty-fourth section repeals all acts, parts of acts, charters and parts of charters, inconsistent with the act in question. Of course there is nothing left but this act to restrain such sale. If it be valid, it in terms only restrains the sale and keeping, with intent to sell, liquors of domestic manufacture. It is true the phraseology is singular. "This section, (the only one forbidding the sale,) shall not apply to 'liquor,' the right to sell which in this state, is given by any law or treaty of the United States." When words are used in a penal statute, for the control of the actions of persons, they must, of necessity, be taken in their ordinary and popular sense. They are for the government and obedience of the people. If they are so mystical, equivocal, or obscure, that they cannot be easily understood—if they require the definition of the judges, before the people can know what they mean—how can it be expected that the people will obey them?

The law on such a subject ought to be so plain, that "a wayfaring man, though a fool, need not err therein." It has been seen, that gentlemen of high legal attainments have already differed as to the meaning of these terms; and that whilst but little difference exists as to the meaning of the words themselves, some think the expressed intent of the law-giver, rather than the meaning of the words, should govern. Men are governed by the laws, and by the intents therein expressed, in apt and proper words, as well as the spirit, of such laws. There is no law or treaty of the United States which, in so many words, gives the right to sell liquor. This the law-givers knew. What did they mean to exclude from the operation of the act? They did not intend to interfere with our foreign or domestic commerce. They knew that the right to import, carried, as an incident, the right to sell. This right to sell imported liquor, the Supreme Court had decided, did exist, under the laws regulating imports. They knew that such a restriction would interfere with existing treaties.

No doubt they intended, if they could, to inhibit the use of foreign liquor as a beverage. They have not done so—they could not, for the want of power. The act does not, (whether they intended it or not,) restrain such sales. Such liquor is expressly excluded from the operation of the act, not simply by way of exception, or proviso, or saving clause, but by separate, positive, clear, and unequivocal words. There is neither room for construction or interpretation.

If it should be said that this clause only intended to save the right of the importer to sell in original packages, and claim this interpretation by reason of the clause contained in the twenty-second section, which declares, that the act "shall not be construed to prevent the importer of foreign liquor from keeping or selling the same, in original packages, to any person authorized by this act to sell such liquors," the answer is, that this only furnishes a statutory rule, forbidding a particular interpretation, but does not add a limitation not covered by the words of the enacting clause, which is the prohibitory section. The rule is, that if a particular thing be given, or limited, in the preceding parts of a statute, this shall not be taken away, or altered, by any subsequent general words of the same statute.

If it were true—which I deny—that in the case of Brown vs. the State of Maryland, it was held that the importer could only sell in original packages—then this law does not restrain the sale in such form to any person, except, perhaps, to the person authorized by the act to sell. The state has no power to limit the sale of an importer of any imported goods to a sale, in the precise form in which he has imported it. He is in this business of importation subject to the laws of Congress, who alone have the power of regulation. Unless they restrain him, he is free. The duty he pays is of impost and excise—is upon each and every gallon, and, therefore, upon each and every drop; and, having so paid, the incidental right to sell attaches, not only to the whole, but to every specific part. It makes no difference whether a part of a cask of wine, after importation, is reduced in quantity by sale, or waste; the remainder is protected from the operation of a state law, except for the purpose of tax, and a license to regulate the retail sale.

Suppose a cask to break, or a crate to burst, or a bale to be broken, on its way from the wharf to the storehouse: can the importer not sell it, because, for preservation, it has been placed in another vessel? When does it lose the protection of the acts regulating imports, and become a part of the common property of the state? Does it as soon as landed from the ship? Has the importer no right to break the package, in order to compare the goods with his invoice? For this purpose, may he not take it to his own store? May he not keep it there until the market suits? Does his right terminate within any limited time? Is it not a continuing right, so long as the importer remains the owner—the duty being paid? The reason seems to me to be obvious.

After he has parted with his imported article by a sale and delivery, either in whole or in part, then, and not till then, does it become a part of the mass of property in the state, and thereby become subjected to the local laws. The cases which have been before the Supreme Court of the United States are not authorities in conflict with this position. In those cases this distinct question was not presented, nor did it arise.

Although the opinions delivered by the Judges in 5th Howard undoubtedly countenance the idea, that the right to sell in original packages was alone secured under the right to import, I think the question still an open one.

The power to regulate commerce with foreign nations, and among the several states, is a single and an exclusive power in the national government. I am aware that it is contended, that in the cases in 5th Howard, it was held that, so far as regarded commerce between the states, it was a dormant power, and, until called into exercise by Congress, the legislation of the states might operate on it.

This question was not involved in those cases. Whether the power is dormant or active, if Congress has it exclusively, and not concurrently with the states, then, whether regulated or not by Congress, the power cannot be exercised by the states. I believe it is not denied, that, as to foreign nations, the power is exclusive. Why? Surely not because the power in that regard only has been put into exercise, but on the only tenable ground, that the power is exclusively placed in Congress. It is but one power, made applicable to our foreign and domestic relations. The language is clear and explicit: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Can these copulative conjunctions be any grammatical construction or species of legal logic turned into disjunctive conjunctions.

The Father of his country, in reporting the Constitution to Congress, said: "The friends of our country have long seen and desired, that the power of making war, &c., and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the Union."

The alienation of state sovereignty exists when the Constitution, in express terms, grants an exclusive authority to the Union—or where it prohibits the states from exercising the like authority—or when it grants an authority to the Union, to which a similar authority in the states would be contradictory and repugnant. When the powers are concurrent, they are such, that the exercise of them would only affect the *policy* of the general government, but not its *power;* in such cases, they would be neither repugnant nor contradictory.

The absence of power to regulate commerce was one of the defects existing under the confederation. The interests of trade and finance demanded a federal superintendence. "The want of it," says General Hamilton, "has already operated as a bar to the formation of beneficial treaties with foreign powers; and has given occasion of dissatisfaction between the states. The interfering and unneighborly regulations of some states, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be

feared that examples of this nature, if not restrained by a national control, would be multiplied and extended, till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse betwen the different parts of the confederacy."

"We may reasonably expect, from the gradual conflict of state regulations, that the citizens of each would, at length, come to be considered and treated by the other in no better light than as foreigners and aliens."

When this power was introduced into the Constitution, it was violently opposed, and its propriety nobly and eloquently vindicated. It fitly and aptly belongs to the national sovereignty. It was intended that there should be no conflict between the states on this subject; and, in the language of high authority, "unless the judges embark in a conspiracy with the Legislature, and subvert a mathematical axiom, by taking away a part, and letting the whole remain, they will pronounce this law, (so far as it may interfere with our domestic commerce,) to be contrary to the supreme law of the land—unconstitutional, and void." The framers of the law seem to have labored under this difficulty—hence the law permits intoxicating liquors to be kept, "while in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of destination."

This express authority covers and frees the domestic, as well as the foreign liquor. In neither case would the liquor be subjected to the law of the state, until it came within its territorial limits. This actual transportation from one place to any other place in the state, or through it to some other state, may be by land or by water; and whilst in transitu, or stored in any warehouse on its way to its place of destination, no matter where, it is free from the operation of the act.

The twenty-second section cleary proves this to be so; for whilst it defines the terms "intoxicating liquors," and "liquor," to include alcohol, &c., it declares that cider may be sold in quantities not less than ten gallons; and "this act shall not prevent the manufacture of alcohol, or pure wine from grapes grown by him, from keeping, or from selling such alcohol or wine, nor the importer of foreign liquor from keeping or selling the same, in original packages, to any person authorized by this act to sell," &c.

The second section also recognizes this right. It authorizes the agent to sell "intoxicating liquor, and alcohol, and wine," for special uses therein named. How is the agent to supply himself with all the liquors that the "mechanical, chemical, medicinal, and sacramental" uses will require? If the foreign and domestic trade will not supply him, he must manufacture it himself.

The cider may be sold without the agency. Did they intend that the manufacturer of "burning fluids," "essences," "drugs," "varnishes," and all others named in their memorandum of

"special rates," should not purchase except from their appointed agents? Surely not. Liquor, by the act, is recognized as property, and as an article of commerce, and is subjected, as such, to the regulation of Congress. If they have not regulated the domestic production as an article of commerce, either among the states, or as an export, it cannot be in a worse condition, by reason of such neglect, than the imported article.

It would be worse than idle mockery to say, that, under the ægis of the Constitution of the United States, foreign productions could find markets in the states of the Union; and that whilst the several states have no control over the foreign production, they can exclude the domestic manufacture, and so give protection and markets to a foreign article over a home production. This power emanates from, and was conferred by, the people of the United States upon their Congress, a body of their own selection; it is not a grant of power by the states—it was taken by the people from their own treasury of power, and placed in their own federal head. They have said, that they did this "to secure the blessings of liberty to themselves and posterity;" and have not their posterity the right now to call to their aid the judicial power, to guard and protect the flowers of "justice, tranquility, and peace," which they planted, bending under the weight of a most pitiless storm?

To guard against such encroachment by either state or general government, they declared, "that no tax or duty should be laid on articles exported from any state; that no preference should be given, by any regulation of commerce or revenue, to the ports of one state over another; nor should any vessels bound to, or going from, one state, be obliged to enter, clear, or pay duties in another;" and further, to make manifest their clear determination to free the question from all doubt, they inhibited the states "from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws." I am of opinion, that the statute does not exclude domestic imports. It may be brought into the state, seeking a market; that it may be sold, or kept for sale, or exported to another state, or to foreign countries. That if the act does, in terms, exclude such liquors, the Legislature has transcended its power, because it conflicts with the Constitution of the United States.

The act affects to punish the mere intent to sell the liquor, and for reasons beyond legislative control, is in this respect impotent. The unexpressed intents of men are not the subject of human legislation. No crime or misdemeanor can be committed without *an act*, committed or omitted; no mere intent is the subject of human punishment. To make a crime or an offence cognizable by human laws, there must be both a will and an act. "For, although in *foro conscientiae*, a fixed design or will to do an unlawful act, is almost as heinous as the commission of it; yet, as no temporal tribunal can search the heart, or fathom the inten-

tions of the mind otherwise than they are demonstrated by outward actions, it therefore cannot punish for what it cannot know." "An overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment; and as a vicious will, without a vicious act, is no *civil* crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. To constitute a crime against human laws, there must be a vicious will, and an unlawful act consequent upon such vicious will."

"The keeping for sale," or "with intent to sell," is made a misdemeanor. It may be said the keeping is an act; true, but it is not unlawful to keep it. The act of keeping being lawful, no evidence of an unlawful intent can be drawn from it. The cases of counterfeit money can have no application here. It is unlawful to make counterfeit money, and the tenderness of the law, in ordinary cases, presumes a man's possession innocent. If there be an attempt to pass it, such an attempt is an act which is resorted to as an evidence of a guilty knowledge that it is counterfeit. The counterfeit is, in itself, unlawful, it purports to be what it is not—there is no property in it; it is a fraud of another's right. The liquor is property, and its possession is not forbidden, and a sale to the authorized agent is lawful. Keeping it with intent to sell it to such agent is not unlawful.

The act attempts another thing, not within *legislative power*. It makes all liquor kept in violation of the act "a public nuisance." The liquor, throughout the act, is acknowledged to be not only useful to mankind, but it specifies a variety of uses to which it may be applied; indeed, it recognizes the fact, that it enters largely into mechanical, chemical, and medicinal arts; without it, those arts must languish, and some departments perhaps die. The liquor, in itself, is no more a nuisance than those arts, nor than the men who call it so. The Legislature can no more make it a nuisance than they can change the rule in multiplication, when they can multiply two by two, and make the product five, than they can make the use of liquor, or any thing else good or harmless in itself, a nuisance. Does the abuse of a thing *useful* in itself, as applied to the multifarious wants of human life, make *it*, or the instrument of its abuse, the nuisance? Is not every slanderer, and especially a man who has a "harmless" tongue in his head, (when he gives utterance to the glowing thoughts and burning words of a divine calling,) when he indulges in rancorous bitterness, and publicly abuses persons by name who do not choose to follow in his lordly footsteps, or choose a despotism in preference to a well regulated liberty, a greater nuisance? Will the lawmakers say that such men are nuisances? No; rather

> "A slanderer felt a serpent bite his side!
> "What followed from the bite? the serpent died?"

let it be said of them as the poet has:

At common law, a "public nuisance" may be abated by any

person. This statute, in effect, confers the power upon every person to destroy the liquor so kept, and perhaps some sturdy champions of the unlimited power of this act may take it into their heads to destroy the article, without the slow judicial process. It intended to confer the common law power to destroy the article, in all cases. To enforce the remedy by destruction, when it was secretly kept, it provided the search and seizure clauses.

It is a settled rule of construction, that a new statutory remedy does not take away the remedy at common law, unless absolutely inconsistent with it, or the act in terms abrogates it. To embolden the reformer to destroy the article the sixteenth section provides: "That no person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any other person, unless he, (the owner,) shall prove that such liquor was sold according to the provisions of this act, or was lawfully kept and owned by him."

In this the Legislature authorize a new mode of confiscation, however heretofore exercised, never yet tolerated by a free people, or sanctioned by any judicial authority. Unless, I repeat, our courts of justice are disposed to favor the new doctrine of legislative omnipotence, they will, without hesitation, declare this portion of the act wholly at variance, not only with the general principles of civil liberty, but in direct conflict with constitutional law. Can it be, that in these enlightened times it may be said, that in the Empire State, the property of the citizen may be taken against his will, and be destroyed, without complaint, without warrant, without judicial judgment, without process, by any person who may choose to do so, and for this he shall have no remedy, unless he shall first prove a thing *impossible* to be proved, that is, the "*intent*" with which he "*had*," or "*kept*" the article.

The search and seizure clause of the act is so manifestly a violation of personal rights, that the common mind universally condemns it. Mr. Hill, in his lucid and logical opinion, has successfully overthrown it, without calling to his aid the fourth article of the Amendments to the Constitution of the United States.

That article declares, "that the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated." It has been gravely asserted by the champions of this act, that such a search is not unreasonable. The law of nature gives to the searching rain and the rude wind free access through the cracks and crevices of my dwelling; the common law gives its officer, armed with its proper process, at the peril of some responsible person, the right to search it for another's goods, proved to be concealed therein, and to have been stolen; but no private man or public officer *can* be clothed with authority to enter my house, no matter how humble

it may be, to search it for my property against my will. It is above and beyond the power of language and of thought to make such a search reasonable, and so within the provision quoted.

It is also said, that this constitutional article only imposes this restraint of search upon the powers of the government of the United States. I understand the Constitution to be of and for the people. All judges and public officers swear, in their official oaths, first, to support the Constitution of the United States, and, secondly, the Constitution of their own state. The provision secures "the people" in the "*right*," and declares that this right "*shall not be violated.*" We may wait with the most perfect serenity to see who will, upon such a mandate as this act, first violate his oath, and next this priceless jewel of human right.

We approach now a more important and difficult question of solution: Whether the Legislature of this state has the power to *prohibit* a trade, or business, occupation, or employment, universally recognized as legitimate and lawful in this state? That they may "*regulate*" the sale and the disposition of property—that is to say, to fix the time within which it may be sold, the place or places where it may be kept, and how, and to whom, and by whom it may be sold, and to whom it shall descend, or pass, and generally to *regulate* the trade and traffic of the state—may be conceded. That they may make proper police regulations, provide against disease and pestilence, is not denied. The question presented is not as to the power of the state to regulate its internal trade and traffic; it is as to the power of the Legislature, either directly or indirectly, to break up and destroy a legal business—a trade in an article acknowledged to be property, useful in itself, only injurious to the individual when used to excess; in itself absolutely necessary to human progress; beneficial to science in three of her great departments, and of high religious importance; a lawful trade in articles universally admitted to be the subjects of ownership and of exchange, barter, and traffic, like any other commodity, in which a right of property exists; a trade and business in full existence at the time of the formation of the state. The act proposes to destroy all this.

It attempts to put into operation functions requiring not only legislative, but judicial powers. It declares the liquor a nuisance, and so deprives it of its essential quality of property. It gives every person a right to pronounce judgment of condemnation, and to destroy it, which are judicial and executive acts. Successfully to effect this, the act reverses that golden rule of law, which presumes all men innocent of crime until found guilty, by adjudging the keeper of liquor guilty without proof, and compels him to abandon his property, or *prove* his innocence of an assumed offence; this mingles legislative with judicial power

The owner has not even the poor privilege left him of asserting his innocence, but he must *prove* it. What becomes of the checks and balances of a free government, when such invasions are tolearated? From a constitutional government, we are turned into an oligarchy. How long will it be before this same power may declare any other trade, occupation, or employment, or business, unlawful and a nuisance? The dry-goods merchant, who sells the silks and gewgaws that lead to extravagance in dress, and so to dishonesty—the dealer in any implements of trade or manufacture, which may be used for improper purposes—the mechanic who makes a barrel, hogshead, or tierce, which may hold the liquor, or any other article which may fall under the sway of any other fanaticism, are all at the mercy of legislative power. If they may do these things, may they not soon prescribe the character of the dress we shall wear, the time of going to bed and of getting up, what we shall eat and drink, and wherewithal we shall be clothed—having said what we shall not drink? How soon may they not order all men to wear red breeches, blue coats with brass buttons, and white top-boots? How soon may they establish Fourierism, and a cabbage or vegetable diet? If they may sit in judgment upon one article, either of drink or diet, what is, then, to restrain them in regard to any other? The act is a clear invasion of the judicial power.

The broad ground is now asserted, that the power of the Legislature is sole and uncontrolable by any thing, save the fundamental law. That no matter what acts they may deem fit to enact, such acts cannot be questioned by any law or rule, except such as is to be found in the written Constitution; in other words, a sort of omnipotence is claimed to be an attribute of legislative power. It has been likened to the power of Parliament in England. Even there, the rigor and arbitrary proceedings of simple excise laws were denied to be compatible with the temper of a free nation, and in this country led to the celebrated Shey's rebellion.

Excise laws generally conferred the power of "entering and searching the houses of such as dealt in excisable commodoties," to the total exclusion of the right of trial by jury, and in disregard of the common law. It is a singular fact, that in 1642, when aspersions on account of a supposed intent on the part of the Commons to introduce excises, the House, for its vindication, declared, "that the rumors were false and scandalous," and their authors deserved severe punishment. It was then declared, by a people less free than ours, "that it was an illegal, detestable, and oft-condemned tax and extortion;" and now, at this day, it is claimed, that a statute far more odious than any that ever yet found its way upon our statute books, is to stand legal scrutiny, and be held operative, on the ground of legislative power.

"The power of Parliament," says Sir Edward Coke, "is so transcendent and absolute, that it cannot be confined, either for

causes or persons, within any bounds." "It hath," says Sir William Blackstone, "sovereign and uncontrolable authority in the making of laws, &c., this being the place where that absolute despotic power, which *must in all governments* reside somewhere, is intrusted by the Constitution of three kingdoms. It can, in short, do every thing that is not naturally impossible, and therefore, some have not scrupled to call its power, by a figure rather too bold, 'the omnipotence of Parliament.'" This same Sir Edward Coke, with an intrepidity that does him high honor, when Chief Justice, declared and held against this absolute despotism, "that when an act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law should control it, and adjudge it to be void." So Lord Chief Justice Hobart, equally uninfluenced by fear, "declared, "that a statute contrary to natural equity shall be void;" and so Lord Holt, in the case of the City of London against Wood, to the dismay of all mere lawyers, manfully expressed an opinion "that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying." This same fearless and honest judge, in another case, declared "that the authority of Parliament is from the law; and as it is circumscribed by the law, so it may be exceeded, and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men."

This much has been said of an act of Parliamant, which Sir William Blackstone declared "to be the exercise of the highest authority that the kingdom acknowledges upon earth." It is true that King James asserted that Lord Coke "had many dangerous conceits of his own uttered for law to the prejudice of the Crown; and Lord Ellesmere, in speaking of the passage quoted from Coke, called it "a paradox, which derogateth much from the wisdom and power of Parliament;" and subjoined, as a reason, "that it was a great hardship, that when the three estates, King, Lords, and Commons, had spent their labor in making a law, three judges on the bench should destroy and frustrate their pains." And a Chief Justice Hale, with fear and trepidation, while admitting that some acts of Parliament were "made against *law* and right," urged that they that made them, perceiving it, *would not enforce them;* "for," says he, "it is *magis congruum* that acts of Parliament should be corrected by the same pen that drew them, than be dashed to pieces by the opinions of a few judges." Sir William Blackstone confines the rule of avoidance of unreasonable statutes, "to any absurd consequences which arise out of them collaterally." Lord Denman, Chief Justice of the Queen's Bench, imbued with the spirit of liberty, declared judicially, and was sustained by his peerless associates in asserting the principle, "that there was no *power* in that country *above being questioned by the laws*," and to remove all cavil as to what he meant, he repeated it, in these warm

and cheering words, "*that a despotic power could not be recognized or exist there.*" Even in that country, whence this idle theory of legislative omnipotence is pretended to be drawn, a statute, contrary to natural equity, if it impugn an original law coeval with our nature, must, however reluctant the judges may be to defeat a statute, be declared void. This, it has been alleged, sets the judicial above the legislative power; but Lord Coke denies it, and says, "it is not done by the crooked cord of the discretion of the judges, but is measured by the golden metwand of the law;" it is controlled by the common law. So much for arbitrary power, which must reside somewhere, and Parliamentary omnipotence.

It is to be remembered that our government hath no divinity, except in the restraints which the wisdom imparted to our glorious ancestors imposed upon it, that it is not to be subjected to the conceits of the modern champions of an unrestrained and uncontrollable power. In South Carolina, the court held an act of the Colonial Legislature void, and re-asserted no novel principle, when it declared "that a statute opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the social compact, was void." The same doctrine was again asserted and approved by the late Judge Barculo, in this state, who held upon principle as well as upon authority, "that a legislative act, whether a positive enactment or a repealing statute, which takes away the vested right of property of an individual for any purpose, (except when taken for public use, and upon a just compensation,) is to be adjudged invalid, and as being above the power, and beyond the scope, of legislative authority.

It is true, that men of eminence and of legal celebrity, have disputed the doctrine for which I contend. My argument is, that the power of making and enforcing laws should, and must, be consistent with the general principles of a free government. These general principles are essentially fundamental, and lay embedded in the foundations of every free state, and alone sustain civil and religious freedom. They are as immovable as mountains. Like the laws of nature, they are essentially the same, yesterday, to-day, and forever. They are embodied in the principles declared in Magna Charta, and are the pillars upon which all our civil and political rights now stand. They do not depend for their maintenance and support upon the determination of the legislative power.

The Bill of Rights may be repealed; such repeal would only remove from the statute book the words containing their inspiration; their living principles would still stand, and visit the conscience of every upright judge, and claim his protection. Nothing short of judicial obliquity can enable the Legislature to override them, and establish tyranny and arbitrary power in their place.

Of this opinion was Mr. Sharp, Chairman of the Committee

on the Bill of Rights in the Convention of 1821; he said: "A Bill of Rights, setting forth the fundamental provisions of our government, has always been held sacred, and I have seen, as other gentlemen familiar with legislation must have seen, the utility of this Bill of Rights, which serves as a standard easily referred to, on all constitutional questions, one calculated to restrain useless and improvident legislation;" and Chief Justice Spencer, with judicial precision, in the same Convention, said: "Perhaps, indeed, where rights are so well understood as in this country, *it is useless* to have any bill setting them forth; yet, upon the whole, it was deemed proper to keep before the eyes of the Legislature a brief and paramount declaration of rights, beyond which they cannot go."

The fallacy seems to me to lie in the idea that the Legislature is a sovereign power; such power does not lie *alone* in the law-making power. The powers of sovereignty in our free states reside in the people—they alone are sovereign. So much of this power as they intended should be exercised over them, they delegated and distributed among the three great departments of government—the Legislative, the Judicial, and the Executive. They constituted each as a check and balance upon the other. Each has its own appropriate duty to perform within the limits prescribed; the choicest flower of them all is the Judicial; the source of all is God and the people. In the distribution of them it is a noticeable fact, that upon the Legislative and Executive, restraints have been placed, and upon the Judicial, no limit or restraint has been imposed, for the simple and the plain reason, that its power is an attribute of Him who rules the destinies of men, and its boundaries are, "*Fiat Justicia ruat cœlum.*" The sacredness of life, liberty, and property, is not placed under the unrestricted charge and disposition of the legislative or executive power, or of both combined.

To prevent all misconception or misunderstanding, the people embodied, in their written mandate, that "no member of this state shall be disfranchised, or deprived of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." "That trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted." "No person shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

As the faithful sentinel and guardian upon the watch-tower of civil liberty, they have placed the judicial power, and in her hand the even balances; the standard of her weights and measures are the Bill of Rights and constitutional enactments; beside these stand the never-dying laws of nature and of God.

To these pure springs our judiciary come to drink in the divinity which alone doth hedge a free people. Fresh from a successful struggle against the despotic exercise of legislative and executive power, our forefathers baptized these principles in blood, and taught them to their children. They were household words, familiar as the air they breathed, and better understood; and now, within one short century, we are to be asked, on our next anniversary, "What mean ye by this festival?" Which of us shall answer the question? Who will dare to point to the Declaration of Independence—to the Bill of Rights—the Constitution, if the act of the ninth of April holds within its folds the mangled and bleeding bodies of these principles, to be consecrated by a judiciary admitting itself equally within the grasp of the legislative power?

Need we turn to the dusty times of civil and judicial history for interpreters and authority? Does not every pulse, now quickened with the recollection of a glorious ancestry, respond to the truth that civil and political liberty may be crushed under the foot of arbitrary despotism, but that not one jot or tittle of these spiritual essences of freedom can be destroyed? My opinion is, that this law is unconstitutional, and must be so declared.

1st. It disfranchises the citizen. Franchise and liberty are synonymous terms. Civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society. Political liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws, (and no further,) as is necessary for the advantage of the public. Liberty must be limited and regulated in order to be possessed. The degree of restraint it is impossible to settle; but it ought to be the constant aim of every wise public council, to find out by cautious experiments and rational cool endeavors, with how little, not how much, of this restraint community can subsist.

It destroys the value of an article recognized in all ages as property, the right and liberty to sell which has never been denied. It disqualifies the "peers" of the party to be tried for a violation of the act. It at once disfranchises the dealer and the juror by whom the dealer might be tried. The last resting-place of human rights, the "jury-box," is invaded in advance, and upon the banner unfurled to the astonished people is emblazoned the words: "A perjured and a drunken people."

2nd. It violates the Constitution in the right of trial by jury. Who are to be our peers? The men that love despotism and tyranny better than law or liberty, the intemperate fanatic, the disqualified "jurors" under the act, or the qualified jurors under the Constitution. When the act disqualifies my peers in advance, it deprives me of the right of trial by jury secured to me by the Constitution. These provisions were intended that the stream of *power* should return in *rivulets* through the jury-box to the original source and fountain of all legitimate authority—the peo-

ple. Through this alembic it is to be purified from the turbid and arbitrary elements of despotism and tyranny.

3rd. It again violates the Constitution in imposing excessive fines, and in inflicting unusual punishments. If the sudden disruption of a business, acknowledged for centuries to be lawful, and the forfeiture of the property, acknowledged to be such by the act itself, shall not be held to be an excess of fine and the infliction of unusual punishments, then the establishment of the judicial power will be, what is gravely contended for, an idle mockery.

4th. If the inhabitants of the state are, or so large a part of them have become, so besotted, and so unfitted to take care of themselves, that the Legislature, under pretence of taking care of the public health and the public morals, must needs break up and prohibit the sale of liquor, to prevent its being used as a beverage, then they take private property for public use, and must make just compensation for it. It may be said that they do not take the property, they only prohibit its sale—the *value* of property depends upon its saleable and transmissable *quality*, the essence of the right to property is the right of disposition by barter, sale, or exchange; when the Legislature takes away the right of disposition, which in a state of civil or political society almost alone gives value to property, then they invade the right to private property, and as in the present case they take this right for the benefit of the public, they are constitutionally bound to make just compensation.

I believe my answer covers all the questions submitted for my opinion. To speak of my views of this temperance question, or of the policy of this act, or to vindicate the character of the profession to which I am proud to belong, from many unjust aspersions made in advance, that our opinions would be made to suit your wishes, notwithstanding our honest convictions to the contrary, would be out of place here. I have a right to say, and I feel it my duty so to say, that I have an abiding confidence in the strength, firmness, courage, and purity of our judiciary. My experience, for a period rapidly approaching half a century, has confirmed me in the belief, that in their hands the just and constitutional rights of the people are safe from the inroads of encroaching governmental power. A due submission on the part of the people, and a perfect obedience to judicial interpretation and decision upon all questions arising under this law, whatever they may be, is the first and paramount duty of every good citizen; and I trust that nothing that has fallen from me will be construed into an idea that I would justify personal resistance. If the Constitution and principles of freedom fail us under judicial authority, the only legitimate remedy left is an appeal to the ballot box, and through its instrumentality a correction of all such legislative evils as the popular voice may think it fit to be administered.

New York, June 18, 1855. J. R. WHITING.

OPINION OF

GEORGE WOOD, ESQ.,

ON THE PROHIBITORY LIQUOR LAW.

The act of the Legislature of this state, recently passed, for the prevention of intemperance, pauperism, and crime, has been so fully discussed in the opinions of different gentlemen upon this subject, and accompanied with the citation of so many authorities, that I do not think it advisable, at this time, to enter largely into the discussion of it.

I shall confine myself to giving, in my opinion, the general results of the examination I have made of the case, with a few explanatory remarks.

This is a highly penal statute. It creates offences which did not exist in the law before, and is lavish in inflicting fines, imprisonment, and forfeiture of property.

I shall first consider this case on the supposition that all liquors, as well those imported as those manufactured in the country, are embraced in the provisions of the law.

I think this act, if carried out, will amount in effect and substantially to the general destruction of this kind of property.

It prohibits the sale of liquors for all purposes except for medicinal, manufacturing, and sacramental uses. These exceptions are comparatively trifling in amount. They form a mere minimum.

This kind of property is manufactured and imported, bought and sold to be used as a beverage, and when no longer allowed to be used in that way, it is rendered, in a great measure, worthless as an article of merchandise and traffic. Under these circumstances, it is questionable whether a dealer in the article could afford to pay the storage for keeping it.

The power of disposal is an essential ingredient in the idea of property.

Property imports dominion, use, control. In a civilized country; indeed in any country advanced beyond the hunter state, the power of disposal is all important. No man would acquire this property in the way of business as an article of exchange for the ordinary uses to which it is applied, unless he could sell it.

A manufacturer or importer don't expect to consume himself, or in his own family, his merchandise. Every one must see,

then, that the great object of this act is, by destroying the general power of disposal of this property for its ordinary uses, to destroy the property itself, and it must be so held in law. This minimum of exception will only serve to establish the general rule and object, which is destruction.

The question then arises, can the Legislature destroy this property by this act under the circumstances of the case? It will, I think, be conceded by every constitutional lawyer, that they cannot pass an act arbitrarily to destroy any kind of property without some legitimate ulterior object to be obtained. Suppose they should pass an act to destroy all the superfine broadcloths in the state—such an act would cut to the bone. It would be absolutely void. It would be so, because it would impair vested rights.

Suppose the act should go further, and prohibit the future acquisition of such property—it would, then, also be void. It would, in that case, deprive the citizen of the inalienable right to "the pursuit of happiness," or, in other words, to acquire by his industry the comforts of life. It would deprive him of the liberty and privilege of acquiring property. This liberty was procured in England by Magna Charta—and the provision therein is imbedded in our state Constitution.

The right to property is a vested right, and cannot be arbitrarily taken away without impairing the obligation of contracts.

It is said the state Legislature, in its sovereign capacity, can regulate property. This is true. And under this head they may restrict and control its use, regulate the mode of sale, and even prohibit its sale altogether. They may, also, direct its destruction at once and absolutely. But all this must be done, and can only be done, for some legitimate ulterior purpose within legislative competency. They may do all this when necessary for the preservation of life or health—of religion or morality. But, in a free country, where property is protected under a paramount fundamental law, the necessity must clearly exist.

When that necessity does not exist, the fundamental law must prevail—must protect property from the iron grasp of arbitrary power.

There is, and in the nature of the case there must be, a line of demarcation between this legislative power on the one hand, to impair and even destroy property for those ulterior objects above alluded to, and on the other hand, the power of the judiciary, under the fundamental law, to protect the citizen in his property against hasty or ill-advised legislation, aiming at the destruction of property when that necessity does not exist.

By whom is this line to be drawn? The advocates of arbitrary legislative power say it must be done exclusively by the Legislature—that *they* are the sole judges. This would be rendering the fundamental law, as to its action upon the Legislature, a dead letter. When the wish to destroy property by sumptuary

laws, all they have to do is to aver, by way of enactment, that it is *useless*, or noxious, and the hands of the judiciary are tied. It is said they are sovereign; but their sovereignty cannot screen them, when their acts are brought to the touchstone of the Constitution and the supervision of the judiciary, who are its guardians.

The Legislature is, of course, to decide for themselves in the first instance, and if there is a probable ground, the averment that the property is a nuisance or otherwise injurious, so as to present a foundation for the restriction upon its use or for its destruction, their decision and action will be final and conclusive upon the judiciary. But, if there is no such probable ground, the judiciary should pass upon the subject accordingly, whenever the matter is brought regularly before them.

By way of illustration, take the cemetery cases in fifth and seventh Cowen's Reports. Certain lots had been used as burying grounds in the city of New York for a long period. In process of time the population became so dense as to render the use of the land for such purposes prejudicial to health; so much so as to amount to a nuisance. The corporation of New York, by ordinance under the authority of the state government, prohibited all future burials. This act of the corporation was the same, in effect, as if it had been done by an act of the Legislature. The judiciary would see a cause for such legislative action. The matter of fact thus based on probability would be deemed by them final and conclusive. Neither the Legislature nor the judiciary, in such cases, act upon what would be called legal evidence in a court of law, but upon that general information acquired in relation to such subjects by officers acting in a public capacity.

But suppose the Legislature, under pretence of a nuisance or some other ground, should prohibit interments within fifty miles of a city, would the judiciary sustain it? Clearly not. They would treat it as an arbitrary interference with private rights, and declare it unconstitutional. In the first two cases alluded to, the ordinances were sustained, because, although vested rights were incidentally impaired, they must give way to the public security. But in the other supposed case, there would be no such mischief existing or to be guarded against. The arbitrary legislation must yield to the protection of property under the fundamental law.

I might illustrate the subject by referring to a class of cases under another branch of the Constitution. Property cannot be taken for public uses without making compensation to the owner. The Legislature takes property and provides what they deem in their legislative capacity a just compensation; but the judiciary have repeatedly held such compensation in particular cases to be inadequate, and declared the act void. They do it because they must exercise a supervisory control over legislative action when necessary to protect private rights under the Constitution.

Another topic of a kindred nature may be here adverted to. A law compelling a judgment creditor to submit to an appraisement of the property of the debtor, and not to file an execution, unless it should bring two-thirds of the apprised value, has been held by the United States Supreme Court to be void, as impairing the rights of creditors. Now it can hardly be pretended that a party to a contract has a greater right under execution in the property of his debtor, than an individulal has in his own vested property.

It has also been decided that a judgment creditor cannot be delayed for a *limited time* from selling on execution. The state Legislature, in these top laws might, by averment, have rendered valid their enactments under cover of salutary regulation, if the judiciary in such cases had been *bound* by their averments.

Gunpowder is frequently a nuisance in certain localities, and the state Legislature may protect human life and property from its injurious effects. But suppose a Legislature, under broad averments of its universal noxious qualities, should enact that it was a nuisance and prohibit the sale of it throughout the state—would the judiciary, when applied to for relief, quietly submit to it, and give no redress?

The sale of liquor in small quantities, in unsuitable places, or by unfit persons, may be injurious. All this may be guarded against by appropriate statutory regulation. Drunkenness may be punished as a vice, and in a way to make it degrading. The property of persons addicted to intoxication, and becoming unfit to manage their affairs, may have their property taken out of their hands. Their is a vast field of legislative regulation open to the reformer within the legitimate scope of the Constitution.

To abolish the entire use of all kinds of liquors, except hard cider, raised in the rural districts, because less than one-half of one per cent. of the entire population are addicted to the excessive use of liquors, is going too far in a constitutional government. It is legislating against the many. In the next place we have to inquire, what are the vested rights which would be unconstitutionally impaired by this act?

They are property in liquor, acquired and owned by individuals at the time the act goes into operation; and secondly, property in liquor imported under the laws and treaties of the United States subsequently to that period. In this, there will be a vested right lawfully acquired, independently of state legislation, and paramount to it.

It is lawful, under the authority of the United States, to introduce it, and to acquire a vested right in it when thus introduced; it is lawful to use it, and it will be protected under the Constitution to the same extent as any other vested right.

But I concur with Mr. Gerard in thinking, that this act does not embrace, within its operation, foreign imported liquors at all.

They are expressly excluded by the exception in the first section. If it should be said that the Legislature did not mean to except the liquor, but only liquor in a certain state or condition, viz: in the original casks and packages, it may be safely affirmed that such a qualification is not in the law. A penal statute cannot be extended or narrowed down in its exceptions contrary to the plain words.

The twenty-second section does not so limit this exception. It is precautionary, not restrictive.

Lastly—The remedies provided for enforcing this act are extremely objectionable. They violate, in most important particulars, the sixth section of our state Constitution.

Among other things, they make a man, in effect, give evidence against himself.

They presume him guilty instead of innocent, and then require him to prove his innocence.

They make *ex parte* affidavits of facts, and even of surmises, evidence against him upon the merits to establish his guilt.

All these provisions are inconsistent with the injunction that no person shall be deprived of life, liberty, or property, without due process of law.

It will be recollected that these provisions in the Constitution are taken from Magna Charta.

It has been attempted to palliate these innovations upon the old settled common law rules, by asserting that similar regulations are resorted to in what are called proceeding *in rem*, in the Federal Courts.

These proceedings *in rem* are taken originally from the civil law, and were introduced into Admiralty and Exchequer cases at an early period. Now, no one will object to them as far as they were thus carried, if they are confined to these subjects within those limits. Magna Charta, from time to time, during a long period, was repeatedly confirmed. During that time there was a constant effort by the ecclesiastics, learned in the civil law, to introduce it, with all its arbitrary regulations, into the main body of the municipal law, which effort was as constantly resisted. Hence this provision of Magna Charta, which, as events show, was *wisely* introduced into the state Constitution. The reformers of modern times, require the same curb which was put by the old common law lawyers, upon the ecclesiastical innovators of that early period. Common law forms of proceeding may be altered; but the great rules of evidence here adverted to, and violated in this act, were intended to be preserved by this provision of the Constitution, which has been borrowed from Magna Charta.

These views and consideration should not be lost sight of in construing this clause in our state Constitution. Otherwise, the whole of our Criminal Code, under the same influences which brought forth this act, might be marked with the same dark features of despotism.

Habitual drunkenness is unquestionably a great vice, and many other moral evils follow in its train. The destruction of all liquor would, to be sure, prevent it. So the destruction of all property would prevent legal theft and robbery.

The great object of the legislator ought to be to awaken a strong feeling of degradation in regard to it. This has not, as yet, been accomplished. It ought to be done, and it may be done without encroaching on Constitutional rights or the great principles of liberty embodied in the admistration of our criminal laws.

GEORGE WOOD.

New York, Monday, 25th June, 1855.

OPINION OF THE

HON. GREENE C. BRONSON,

ON THE PROHIBITORY LIQUOR LAW.

So much has already been said upon our lately enacted liquor law, that I shall only notice a few points, and as to those, shall do little more than state my conclusions without much discussion. At another time I may examine the subject more at large.

I. The Legislature has, in my opinion, taken an unwarrantable liberty with existing rights to property. The owner of liquors, who has acquired them under the sanction of the laws, is wholly prohibited from selling *for use as a beverage*, which deprives the property of much the greater part of its market value; and he cannot sell *for any purpose* without finding two sufficient sureties, in five hundred dollars each, satisfying a judge that he is a man of good moral character, and making oath that he is an elector of the town or ward where he intends to sell, that he does not use intoxicating liquor as a beverage, and does not, and during the time he shall sell will not, follow any one of some fifteen or twenty lawful pursuits specified in the act. These are great impediments in the way of the owner, and in many cases must operate as a total prohibition against selling for any purpose. The right to sell is one of the incidents of property, and that which constitutes its whole market value; and except where the merchandise has been acquired for consumption, there is no difference in principle between denying the right to sell and depriving the owner of his beneficial interest in any other way. Our Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Here there is no process at all. The Legislature has usurped judicial powers which belong to the courts alone, and passed a sentence of condemnation against the property.

Liquors kept for sale, or with intent to sell, in violation of the act, are declared to be a public nuisance. I am of opinion that the Legislature cannot make a thing a nuisance by merely declaring it to be such. It must be noxious, either in its own nature, or from the place or manner of keeping or using it; and whether a nuisance or not, is a question for the judiciary, and not for the Legislature. A public nuisance may be abated by any one; but

he will act at the peril of being able to prove that the thing was in fact a nuisance. The Legislature cannot make the evidence for him, nor give judgment in his favor. The Constitution affords the like protection to life, liberty, and property; and if the Legislature can authorize the destruction of the latter by merely branding it with an odious name, I see no reason why it may not, by the like means, deprive the owner of liberty, or even life itself. He may be denounced as a heretic and burned at the stake.

Excessive drinking is a great evil. It is an offence which should be punished. But it does not follow that the moderate use of liquor is a sin against either God or man, nor that the innocent should be punished as well as the guilty. The gifts of God may all be abused, but that furnishes only a slender reason for denouncing the gifts themselves as a nuisance. The abuse of intoxicating drinks began as long ago as the time of Noah; and yet, when the Israelites were afterwards under a Theocracy and their laws were either written or dictated by the Almighty, the temperate use of intoxicating liquors was not prohibited, nor was it forbidden by the Savior, nor by Paul, nor by any one else, until we get down to the fanaticism of our own times.

The law is open to many other objections. It inflicts grievous penalties, arms inferior and irresponsible officers with unusual and arbitrary powers, packs juries, suspects and threatens magistrates and other public officers, reverses the rules of evidence, by presuming guilt instead of innocence, invites aggressions upon property, and in other ways evinces a consciousness in those who framed it, that the measures could not be carried into execution by the ordinary means for enforcing penal statutes. I will only refer to one or two of these objectionable provisions. Under the law, the man who breaks into a dwelling and takes and carries away liquor as a thief or a robber, has got a better title than the owner of the house, for the latter cannot maintain an action to recover the value or possession of the property, without proving that it was "lawfully kept and owned by him." Again, on the trial of any one charged with a criminal offence created by the act, the delivery of liquor is made *prima facie* evidence of sale, and proof of sale is made sufficient evidence of unlawful sale. And thus, a man who delivers a bottle of wine to be used by the sick, or at the communion table, may be convicted of a criminal offence and shut up in prison, unless he is so fortunate as to be able to prove his innocence. Such laws reflect no credit upon the age or country in which we live; and in my opinion, the Legislature has gone beyond its legitimate power.

If the law had been wholly prospective in its operation, and had only forbidden the sale of such liquors as might afterward be acquired, it would have been free from some of the objections which have been mentioned. But such is not the character of the enactment.

The clauses which inflict penalties and authorize the seizure

and forfeiture of liquors, are subject to several very grave objections; but these, with some other important questions, have been so fully considered, in opinions already before the public, that I shall not discuss them at present.

A plausible pretext is never wanting for violent measures of this kind. The prevention of intemperance is only one among the number. The public good is always put forward as the end to be attained, and that is so important that no one is allowed to question the means of reaching it. But this is a dangerous principle. Under such pretences the greatest enormities have been committed. The rights of all have been invaded, because some men abuse their privileges. The liberties of the people have been overthrown in many countries under color of promoting the public welfare; and under some such pretext men have even been denied the use of the Bible, and the right to think for themselves upon the most important of all subjects.

The law in question is none the less dangerous, because it is specially directed against a class of men, instead of the whole community. That is the usual course in the encroachments of power. The attack commences on the weak points and proceeds by degrees. It has rarely happened that the privileges of a people have been destroyed in one day or by a single blow. It becomes us to watch the first step. If other merchants, as well as those who deal in liquors, had been included in the prohibition against selling their goods, and the farmer and the mechanic had, under some plausible pretext, been denied the right to vend the fruits of their industry, all men would have exclaimed against the rank injustice of the measure. And yet the title to intoxicating drinks, is as perfect as is the title to any other species of property. If we allow the rights of a single class to be invaded, no one can be secure that his rights will not fall next.

II. If we assume that the law is valid, I think it does not apply to imported liquors. The first and general prohibitory section concludes by declaring, that "this section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States," and it is settled by the highest court in the land that the laws of the United States give the importer the right to sell his merchandise in the original packages, in this and every other state. The saving clause which has been quoted, says nothing about sales by the importer, or in the original packages, nor about sales to a particular class of persons; but it extends, in effect and without any qualification, to all sales of imported liquors. There is a provision in the twenty-second section, that the act shall not be construed so as to prevent the importer of foreign liquor, from keeping or selling the same, in the original packages, to any person authorized by the act to sell such liquors. But this is nothing but a saving clause without any prohibition whatever, and I am unable to see how a general saving clause, which takes all sales of foreign liquors out of the

influence of the act, can be restricted in its operation, by a subsequent saving clause, which authorizes sales by the importer to a particular class of persons, but without forbidding sales by and to all other persons. There is undoubtedly some incongruity in the two classes; but as one permits, and the other does not forbid, the unrestricted sale of imported liquors, I see no principle on which the courts can declare a prohibition. They are not at liberty to guess that more was said than was intended in the first section; and if, in truth, there was a blunder, it is the business of the Legislature, and not of the courts, to correct the error. Many rules have been given for the interpretation of statutes, but none of them will authorize the courts to correct mistakes or supply omissions in the law. No rule of interpretation is more directly applicable to this case than the one which declares that penal statutes should be construed strictly.

III. Some judges have held, that the penalties of the old law may be imposed for sales without a license, between the first day of May and the fourth day of July of the present year. But there is one view of the question which, so far as I have observed, has not been considered. The case stands thus: the old law established a license system, from which a revenue was derived to the government, and penalties were imposed for selling without a license. That those penalties will fall, when the new law goes fully into effect, is agreed on all hands. But as nothing but the license clause has yet been repealed in express terms, it is said that the penalties remain. I do not think that entirely clear. The penalties were part and parcel of the license system, and there is much reason for saying, that when the license was denied, the whole system was at an end.

But this is not all. If both laws are held to be now in force, the case will stand thus: the old law forbids sales without a license, and the new law denies a license; and both together amount to a total prohibition against selling in any quantity less than five gallons. The prohibition acts upon existing rights to property. The owner is forbidden to sell the merchandise which he acquired under the old law, and which, by that law, he could sell in any quantity, on obtaining a license. He is, in effect, deprived of a large share of his beneficial interest in the property, and the case is subject to the objections which were first considered. It is a rule in the construction of statutes, that they should, if possible, be so interpreted that they may have effect. That can be done in this case, by holding, that the repeal of the license clause, carried with it the whole system of which the license was a part. Whereas, by holding that the old penalties are still in force, it is very questionable whether the new enactment can be supported. This view of the question seems not to have been considered by those who have held that the old penalties are still in force.

I will not close without expressing the hope, that nothing will

be done, either by way of enforcing or opposing the law, except by an appeal to the courts of justice. That is the orderly and legitimate way of settling the question. If the judges uphold the law, let it be obeyed so long as it remains in force, however unjust may be its operation. Forcible resistance can end in nothing but mischief.

I am well aware, from the past, that some of the advocates of the law will denounce any man, be he high or low, and whatever may be his calling, who either drinks a glass of wine, or differs from them in opinion. They have already attacked the judges, and threats are freely thrown out, that no man shall hereafter be elected to the bench who does not conform to their standard. If they hope to gain any thing, by such attempts at intimidation, it is not to be doubted that they will find themselves mistaken. I hope no man will distrust the judiciary, and make that a pretext for resorting to violence.

GREENE C. BRONSON.

New York, June 26, 1855.

OPINION OF

ROBERT J. DILLON, ESQ.,

COUNSEL TO THE CORPORATION,

ON THE PROHIBITORY LIQUOR LAW

OFFICE OF COUNSEL TO THE CORPORATION,
NEW YORK, April 19th, 1855.

To the Honorable the Mayor and the Common Council:

I have had the honor to receive several communications from the Common Council, the Mayor, and other departments, requesting the opinion of the Counsel to the Corporation upon many questions arising under the late act of the Legislature, entitled "An act for the Prevention of Intemperance, Pauperism, and Crime," and, as many of these relate to the same points, I beg leave to make a general reply in one report.

First.—By the charter of Montgomerie, in 1730, it was ordained and granted that "The Mayor of the city of New York, for the time being, and no other whatsoever, shall have power to give and grant licenses, annually, under the public seal of the said city, to all such persons as he shall think fit to license, to keep a tavern, inn, ordinary, or victualing house, and to sell wine, brandy, rum, strong waters, cider, beer, ale, or any other sort of excisable or strong liquors, within the city of New York, by retail or the small measure, and to ask, demand, and receive, for every such license, such sum or sums of money as may be agreed upon, not exceeding the sum of thirty shillings for each license, all which moneys, so received, shall be used and supplied to the public use" of the corporation.

The twenty-fifth section of the late act of the Legislature, having provided that no license to sell liquor, except as therein provided, shall hereafter be granted, the question arises whether the act in that particular, unlawfully violates one of the rights of the city granted by the charter?

The power to regulate the sale of liquors has been constantly exercised by the Legislature, in disregard of the charter, from the earliest period of the history of the state, after the adoption of the Constitution. By the act of 1801, a Commis-

sioner of Excise was appointed by the state, without whose license no sale could be made. By the acts of 1824 and 1825, the Mayor was deprived of his exclusive privilege, and the Alderman and Assistant of each ward was associated with him in granting licenses, and no license could be granted without the consent of a majority of them; and by the act of 1853, the Councilmen were substituted in the place of the Assistant Aldermen.

In the case of Furman *vs.* Knapp, 19 Johnson, 248, an objection was taken to the validity of the act of 1801, as superseding the power of the Mayor, and in violation of the charter. The court, however, from the evidence in the case, presumed that the corporation had given their assent to the act, and did not deem it, therefore, necessary to discuss or consider how far the Legislature, without the consent of the corporation, might modify or change the charter.

In the case of the People *vs.* Morris, 13 Wen., 325, it appeared that the trustees of the village of Ogdensburg, were, by their charter, empowered to grant licenses for the sale of liquors, and that, by a subsequent act of the Legislature, the power was taken away, and it was contended that the act was illegal. The court, however, decided that it was a valid exercise of power on the part of the Legislature; that the power conferred by the charter was wholly political, and that it was an unsound and even absurd proposition, that political power conferred by the Legislature, can become a vested right as *against the government* in any individual or body of men. If the charter had granted *rights of property*, they could not be infringed; but *political power*, (and the right of licensing the sale of liquors is purely such,) were public trusts, to be executed, not for the benefit or at the will of the trustee, but for the common weal. How long it shall exist, or in what manner it shall be modified, are questions independent of the chartered corporations, and belong exclusively to the people to determine, through the Legislature, in the mode prescribed by the Constitution.

In the case of Satterlee *vs.* Sutton, in the Superior Court, (Kent's Charter, p. 243,) it was contended that the act of the Legislature, appointing measurers of grain for the city, and declaring that no other person should measure grain therein, was illegal, because it violated the charter of Montgomerie, which gave the appointment of such officer to the corporation and their successors forever, with the right to take and to receive all fees, profits, and perquisites arising therefrom. The court, however, decided that the grant to the corporation to appoint measurers, was a grant of political power coupled with no interest, save the fees, as a compensation for measuring; that the grant was not to be considered in the light of property, or intended as a source of revenue, and that, therefore, the legislative act was valid, and the charter so far controlled.

Numerous cases might be cited to the same effect, and it may now be considered well established law, that all grants of political power to municipal corporations, are held at the will of the Legislature, who may abolish, abridge, or modify them, at their pleasure.

The Constitution of the state contains no provision taking away this power; it simply declares that "Nothing in the Constitution shall affect any grants of land within this state, made by authority of the king or his predecessors, or shall annul any charters to bodies politic or corporate, by him or them made."

This, it will be seen, imposes no prohibition upon the Legislature, and was probably inserted, from abundant caution, that the charter of the cities should not be considered as swept away by the Revolution, which had abolished the crown and substituted a new government. (19 John. R. 249.)

But *political powers* must not be confounded with *rights of property*, such as the grants of land, the rights of ferry, the franchise of the streets, and other valuable rights, granted to the city by the charters from the crown. Such rights are protected by the Constitution of the United States, which regards them as contracts, and prohibits the legislatures of the states from passing any law impairing their obligation. (Dartmouth College *vs.* Woodward, 4 Wheaton, 518.) Over such rights the Legislature has no more control than over the private rights of property held by individuals.

The right to license the sale of liquors being a *political* right, I am, therefore, of opinion, that the late act of the Legislature is not an unlawful invasion of the charter.

Second. Under the existing laws, the Mayor, and the Alderman, and the Councilmen of a ward, or a majority of them, have the sole right to grant and revoke licenses for the sale of liquors. The twenty-fifth and twenty-sixth sections of the late act declare, that "no licenses to sell liquor, except as therein provided, shall hereafter be granted," and that this prohibiton shall take effect immediately. The second section, to go into effect on the first of May next, provides, that citizens and electors may keep for sale, and sell liquors, for certain specified purposes, upon the performance of certain conditions, approved by the Judges of the Common Pleas.

I am of opinion, that no license, can hereafter be granted by the Mayor, Aldermen, or Councilmen—and that no existing licenses can be extended—the prohibition against granting is equally effectual against the extending of licenses, all of which, by their terms, expire on the first May next.

Third. The third section of the act provides, that "every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New York, each justice of the Marine Court, and the justices of the District Courts, and the Recorder, shall have power to hear and determine charges and punish

offences under the act," and the question is, whether the Mayor and Aldermen are embraced within these designations. They are, by virtue of their offices, justices of the peace, (Charter, sec. 26,) and this power has not been restricted by subsequent legislation, except in regard to the Aldermen, who, by the amended charter of 1853, are not allowed to sit as judges in the Courts of Oyer and Terminer, or in the Courts of General and Special Sessions, but may exercise the power of magistrates in the arrest, bailing, or commitment of offenders. (Laws of 1853, p. 411.) But similar powers, as justices of the peace, also belong to justices of the Supreme Court, and the judges of the Superior Court, who are, like the Mayor and Aldermen, justices of the peace, *ex-officio*, (2 R. S. 704, 706;) and if the duty of executing this act is devolved on the Mayor and Aldermen, it must be shared in like manner by the justices of the Supreme and Superior Courts. The act, however, specifies the particular officers to whom the power is confided, and, by a well established rule of construction, the mention of one is the exclusion of others.

I am, therefore, of opinion, that neither the Mayor nor the Aldermen are empowered by this act, to hear and determine the charges, and punish the offences, arising under any of its provisions. (People *vs.* Mayor, &c., 25 Wend. 9; Morrison *vs.* McDonald, 21; Maine, 551.)

Fourth. By the twelfth section of the act, certain duties are imposed upon "every sheriff, under sheriff, deputy sheriff, constable, marshal, and policeman;" and by the amended charters of 1830 and 1849, the Mayor is declared to be "the head of the police department" of the city, and is required "to exercise a constant supervision and control over the conduct and acts of all subordinate officers."

I am of opinion, that the Mayor is not authorized to perform any other duty under the act, than to require all policemen in his department to perform the duties enjoined upon them by the act.

Fifth. It is important that the Mayor, in his directions to the police force in his department, should guard against any infraction of that portion of the law, which declares that the first section of the act "shall not apply to liquors, the right to sell which, in this state, is given by any law or treaty of the United States." None of the penalties of the act apply to such liquors, and policemen will not be authorized to seize any such liquors, or the vessels in which they shall be contained. It becomes important, therefore, to inquire what liquors are allowed to be sold by any law or treaty of the United States.

The Supreme Court of the United States, in the case of Brown *vs.* the State of Maryland, 12 Wheaton 419, have decided, that an article, authorized by a law of Congress to be imported, continued to be a part of the foreign commerce of the country, while

it remained in the hands of the importer, for sale in the original bale, package, or vessel in which it was imported. That the authority given to import necessarily carried with it the right to sell the imported article, in the form and shape in which it was imported, and that no state, either by direct assessment, or by requiring a license from the importer, before he was permitted to sell, could impose any burthen upon him, or upon the property imported, beyond what the law of Congress had itself imposed; but that when original packages were broken up for use, or for retail, by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, and become subject to the law of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property.

It is very clear, therefore, that the act does not apply to liquors in the original packages, or to importers who sell them. It will be observed, however, that the act contains a general exemption of "*all liquors*," the right to sell which is given by any law of the United States.

Now, the laws of the United States allow all imported articles of foreign commerce to be sold, but the several states may, if they think proper, forbid or regulate their sale, after the articles have been broken up from their original packages, and have entered into domestic commerce. If this law had simply declared that it should not apply to imported liquors, before they had been broken in bulk, and sold by the importers, it would simply have been a provision in accordance with the Constitution of the United States, as expounded by the Supreme Court of the United States; it would have been merely a lawful exercise of the sovereignty of the state, to its entire extent; but it goes beyond such a declaration, and provides that it shall not apply to the sale of *any liquors*, allowed by the laws of the United States to be sold, and makes no exception, whether such liquors be in the original packages of importation, or in the hands of the importer, or subsequent purchasers. If it had been intended to limit the exception to the original packages, or to the importer, it would have so declared. The exception applies neither to the form in which, or the persons by whom, or the time at which the liquors shall be sold, but is *general* in its terms, and applies to *all liquors* which may, *at any time*, be sold by the laws of the United States.

I am, therefore, of opinion, that the police will not be justified in attempting to enforce the penalties of this act against imported liquors, or their sale, by whomsoever made.

But upon the exemptions arising under the treaties of the United States, I beg leave to defer any opinion until I have had more time to examine them than I have been able yet to bestow.

As the penalties cannot be enforced until after the fourth of July next, no injury can result from the delay.

Sixth. As no parts of the act go into effect until the fourth of July next, except the second, twenty-fifth, and twenty-sixth sections before referred to, it is important to inquire whether any penalties are attached to the sale of liquors prior to the fourth of July next: on that day, and for offences subsequently committed, the penalties provided by the act apply, and not before. And if the penalties enforced by existing laws be inapplicable, then the sales of liquors between the first of May and the fourth of July next, are wholly unrestricted; a delicate and important question arises whether this be so, the solution of which must depend upon a close examination of the statutes on the subject.

The sales of liquors by retail were never free within the city of New York; by the charters of 1686 and 1730, no such sales could be made without license; the acts of 1801, 1824, 1825 and 1827, after providing for the mode in which licenses may be obtained, declare, in effect, that if any person shall sell liquors, with certain exceptions, without being licensed, he shall be subject to certain penalties. The present act has abolished the licenses mentioned in these sections of the existing laws; such licenses cannot now be granted or obtained, and the question is, whether, by abolishing the license, the act has also abolished the prohibition, or whether the prohibition remains in full force. The present act has no where expressly repealed the existing laws: it simply declares, that "all acts, or parts of acts, and all charters and parts of charters, *inconsistent with this act*, are hereby repealed." The exisiting laws prohibit sales without a license, the present law abolishes the license, or rather, substitutes a modified and restricted license, and imposes penalties for its violation. Does the act thereby repeal the existing prohibition? Is the continuance of the prohibition necessarily inconsistent with the act? Inasmuch as the violations of the existing laws are declared to be *misdemeanors*, their prosecution belongs to the criminal department of the government, and the consideration of this question belongs appropriately to the District Attorney, who has delivered to his Honor the Mayor an opinion on the subject.

Seventh. The Common Council, by the authority of the Legislature, has passed an ordinance establishing extra rents for the use of the Croton water, and has therein provided that hotels, porter-houses, taverns, and groceries, shall be charged the extra rates.

It is a general principle, that no person can recover at law for any work done, or services rendered, or supplies furnished, which he shall have done or rendered *knowingly*, in aid of a business or undertaking illegal by statute.

It does not follow, however, that the occupations specified in the ordinance will be necessarily engaged in any business in contravention of the statute. Indeed, it must be presumed, that such portions of their business, as are declared to be illegal by the act, will be abandoned. Water is a necessity of life, and is not used

in such establishments exclusively in aid of the sale of liquors. No contract for the use of it could be avoided, unless it were clearly proved that it was made by *both parties*, with the criminal intent to aid in an unlawful traffic. No such intent would ever be entertained by, or could be proved against the corporation; and I consider the idea quite chimerical, that any such defence to an action for the use of water could be sustained.

Respectfully submitted,

ROBERT J. DILLON.

OPINION OF

A. OAKEY HALL, ESQ.,

DISTRICT ATTORNEY,

ON EXCISE PENALTIES.

District Attorney's Office,
New York, April 18th, 1855.

The excise provisions of the Revised Statutes never applied to New York city. (See section 29 of title 9, ch. 20, part 1.) Chartered privileges substantially regulated our excise to the year 1824. Until the recent act, the statutes of 1824, 1825, and 1833, provided excise regulations and penalties. (Hoffman's Treatise on Powers of Corp. pp. 54 and 62.) By acts of 1824 and 1825, a peculiar Board of Excise was established to give license for sale of liquor. They who were not "*licensed as aforesaid*," or "*according to the provisions of the act hereby amended*," and they who sold in defiance of that act, were liable to penalty and indictment. The act of 1833, page 14, gave to corporation ordinances, which regulated licenses, &c., the effect of statutes, and raised their infraction to the grade of misdemeanors.

In the absence of prohibition, or of a license system, with penalties attached, the sale of liquor is free. It is the necessity for the license, coupled with the ability, if one chooses to obtain license, which creates the excise offences. Selling liquor—an act lawful in itself—becomes unlawful when it is transacted contrary to prescribed forms and regulations, and in the face of declared penalties of the local Board of Excise.

Section twenty-five of the recent act, (which section is now in force,) provides that "no license to sell liquor, except as herein provided, shall hereafter be granted." There is prescribed no mode of license, under this exception, until May first, (even if it be admitted that the permit of section two is a license,) when the section second comes into effect.

These two sections will constitute our excise law until July four, when the entire prohibitory law becomes operative. The penalties attached to selling without the permit of section two, are embraced by sections one and four, not to be in force until July. The penalties of our late excise laws, attach to the neglect

to take out the old specific license, (see section two of 1824, and section two of 1825,) and they cannot be applied in place of the suspended penalties of the new act. It was, perhaps, an omission in the Legislature when founding a new license, to give no immediate penalty. I suppose the confusion and defect to have arisen through the change from the original reading of section twenty-fifth, (which gave the act effect May one, and placed license and penalties in concurrent operation,) to the present reading, which throws the prohibition and penalty sections, necessary to give vitality to section two, into July, and this change was not material in respect to the penalty under the state law, but only as it affected the local excises of New York city.

It may be well conceived, that a naked abrogation of pilot licenses, ferry licenses, pedler licenses, etc., etc., without a substitution of new ones, or if substituting new ones, in no wise aiding them by penalty, would have the effect to make those privileges as free as by the common law they were before license regulated them.

I am of opinion, that as the law will stand from May one to July four, with the old licenses expiring May one, and no new ones permitted upon the old system, to which the late pains and penalties attached, these latter are defunct. Until July fourth shall come, there exists by law no prohibition against selling, and not until this date are the new and suitable penalties to be in force. The new permit of section two is yet bald, and bestows no privileges.

The ordinances of the Common Council operate upon the theory that the local licenses can be granted. They are incompatible with the new legislative provisions, and must fall. (Hoff. Treat. on Corp., page 43. Mayor *vs.* Nichols, 4 Hill, 209.)

Upon Sunday, the state law, which applies to New York city, prohibits the retail and sale of liquor on that day. A penalty is given. But this is a matter exclusively for the cognizance of the Corporation Attorney. The new ordinance regarding Sunday traffic is so inseparably connected with the license provisions, now null and of no effect, that it is inoperative.

The nuisance clause, although said to take effect immediately, is not opetative until July four, because not until then will the keeping of liquor be in contravention of that or of any other act.

A. OAKEY HALL.

OPINION OF

D. D. BARNARD, ESQ.,

ON THE PROHIBITORY LIQUOR LAW.

ALBANY, May 26, 1855.

R. V. DE WITT, ESQ.:

MY DEAR SIR—You have requested me to give you, in writing, the substance of the views which I have, on several occasions, expressed to you in conversation, respecting the validity, or want of validity, of the recent act of the Legislature for the suppression of intemperance. You do not seek my opinion on account of any property or pecuniary interest of your own involved in this measure, nor, I am sure, because you do not feel a deep solicitude, in common with every good citizen, for the suppression, by all competent and proper means, of the evils of intemperance. What you want is, if possible, to be settled and grounded in your personal opinions, respecting a measure of the gravest public importance, and about which such differing judgments are expressed, in eminent, if not equally eminent, quarters. If my views can be of use to you, I am quite willing to give them to you, in a form more expressed and defined than conversations could supply.

I think this act cannot be sustained; I think it ought not to be sustained. No body ought to desire the success of any great measure of benevolence or of reform, which sets out with the violation of principles which lie at the very foundation of human rights and of free government. I think this act does exactly that. It commits a great and grievous wrong—a wrong which, if the like could be committed by one individual upon other individuals, the law would be prompt and severe to redress and punish. And society and government have no moral or legal dispensation to perpetrate a great wrong more than private persons.

The vice of this act is, that it proposes to inaugurate its great scheme of benevolence by the sacrifice of an immense amount of private property. Whether this is five millions or forty, it is not material to inquire. That the amount falling within the operation, direct or indirect, of the act must necessarily be very great, no body can doubt. If the jurisdiction of the state over the subject matter had been as broad and unrestricted as the will of the Legislature, the sacrifice would have been greater. The

policy of the act, if it could be sustained, and be taken as an established precedent, would not leave a dollar of private property in the state, of any description, real or personal, safe from the rapacity, or the fanaticism, of any dominant faction in the government.

When, a few years ago, the British government thought the time had come for the abolition of negro slavery in their West India possessions, by the substitution therefor of a system of forced apprenticeship, one hundred millions of dollars was appropriated from the imperial treasury to make compensation to the owners of slaves. The rights of private property, or of that which the law had hitherto recognized and protected as property, were respected. No just government in the world would act otherwise. No government is either just, or wise, or safe, which would act otherwise. And no legislative measure, proceeding on a policy the reverse of this, can be sustained—at least in a free, constitutional country.

When the case is once fairly and plainly stated, as it seems to me to be presented on the face of this statute, I think that little will remain to be said, by me at least, in the way of argument. If any one thinks he can maintain its soundness and validity after that, why, I hope he will try. I shall be glad to learn what principles there are on which it can be sustained. At present, I do not believe, there are any which an enlightened and really sane man would like to advocate.

The Legislature proposed to itself the task of putting an end to the use, as a beverage, of what is called "intoxicating liquor;" a term which is understood to include all wines, the produce of grapes, and all ales or malt liquors, as well as all ardent spirits. The practical question was, how a design of such magnitude and difficulty was to be effected. Drinking was to be stopped; not only drinking to excess, but, as far as possible, all drinking. And this was to be done on a set day, close at hand. With millions of gallons of liquor of all sorts in the hands of lawful owners, and widely distributed among or within reach of three millions of people, vast numbers of whom were accustomed to use it freely—some quite too freely; with this state of things existing on the third day of July, how was the use of it to be made to cease, universally, from the dawning of the day on the fourth? This was a difficult problem to solve.

In the first place, there were liquors which the arm of legislative power was not long enough, or strong enough, to reach. Liquors imported under the authority of the United States could not be reached, at least while they remained in the original packages; and it would be dangerous to attempt to lay violent hands on all liquors remaining in private dwellings. Whatever measure, therefore, should be adopted, to stop the drinking of liquor, it was evident that the whole ground could not be covered. Importers must still be allowed to bring liquors into the state,

and to sell them; and those who should have private stocks on hand, or should lay them in, in their own dwellings, must be tolerated in the personal use of them. So much is admitted by the act.

Besides, it was indispensable that authority should be given for the supply of such moderate demand as might arise for liquor "for mechanical, chemical, or medicinal purposes, and wine for sacramental uses." This exigency, however, could be met, as it is met in the act, by authorizing persons, qualified in a very special manner, to keep and dispense liquors for those specified objects, with very stringent provisions against their use in any other way.

But the task of stopping the use of liquor as a beverage was still to be accomplished, to the extent of the assumed power of the Legislature over the subject, and much remained for a bold measure to operate upon. The life-long and traditional habits of a whole people, with some necessary exceptions, were to be changed in a single night by the operations of a statute. It was proposed that none should escape, except the comparatively few who might be rich enough to hoard the forbidden commodity in private dwellings, which, it was acknowledged, must be, to some extent at least, held sacred from the right of search. All others must be reformed; and this reform was proposed to be completed in the single night between the third and the fourth day of July. The act was passed in April. It was not the fault of the friends of the measure that a much earlier day than the one named was not fixed upon for the act to take full effect. It was not the purpose, or desire, of its friends to give men time to prepare to change, or even to think soberly about changing, either their habits of life, or their habits and plans of business.

On the third of July, there would be in the warehouses of manufacturers—of the brewers, for example; in the stores and shops of dealers, grocers, restaurauteurs, and keepers of places of public entertainment; and in the cellars of hotels and boarding-houses, millions of gallons of liquor, all accessible to the people, and from which consumers would be enabled to draw their accustomed supplies. It was necessary to bring such an ordinance to bear on the fourth of July, on these liquors, not coming under any necessary exception, that, if not instantly destroyed, their destruction should be effectually provided for and secured, and in the meantime, every cask, flagon, and bottle should be so sealed up, by the will and fiat of the law, that not one drop should be suffered to escape to touch the lips of any human being, on any consideration, or for any purpose whatever.

The case was not without difficulty. These liquors would be private property, of very great value, in the hands of their lawful owners: as much private property, and as much under the protection of the public law of the country, as houses and lands,

ships and carriages, coal and iron, cloth and leather, beef and flour, tea and coffee. No body can doubt that; no body, I think, does doubt it.

Well, one way of avoiding this embarrassment would have been for the state to take these liquors from the owners—of course making compensation for them. The state has the constitutional power to "take private property for public use," on making just compensation. Once in its possession, it might have sent all this liquor abroad, and sold it, or it might have destroyed it. Whether there would have been such a "public use" in the case, in the constitutional sense, as to justify the taking of the property, is not now the question. Some might think there would have been, if I do not. It would, at least, have showed that the Legislature had not altogether forgotten the sacred rights of private property. But those who propose and manage great schemes of public benevolence, are not always the most scrupulous persons in the world about the means to be employed to secure their objects. The more's the pity.

As this knot of difficulty in the case could not be untied, without some cost to the tax-paying public, the Legislature was induced to cut it. This has been done in a very direct and simple way. We shall see that the Legislature has proclaimed, that that which is private property, and which will be private property, at sunset on the third of July next, of the value, probably, of millions of dollars, shall not be private property, or property at all, at sunrise on the fourth. I say it has so *proclaimed:* because this enactment seems to me to have much more of the character of a proclamation, or decree, emanating from some despot, who, like the brother of the Sun and Moon, rules over some barbarian or semi-civilized people, than a solemn legal statute in an enlightened and constitutional country.

The prohibitions and denunciations of the act are broad and comprehensive, and of general application. Exceptional cases are stated and defined. I shall be understood as applying my statements and observations hereafter, *exclusively to cases of property in liquor, so held as to be within the denunciatory provisions of the act, and which are not embraced within any exception stated in the first or any other section.*

The act declares, that such liquor "shall not be sold, or kept for sale, or with intent to be sold;" "nor shall it be given away;" "nor kept with intent to be given away;" "nor shall it be kept or deposited in any place whatsoever."

It declares, also, that any person who shall violate any of these provisions shall be deemed guilty of a misdemeanor, and shall be punished by fine, and, on a repetition of the offence, by fine and imprisonment. It provides that all such liquor shall be seized and destroyed, and declares it to be a public nuisance while kept.

In this manner the act lays all liquor, held in the manner

stated by me, under an absolute and unqualified interdict. It not only makes it a commodity contraband of commerce, trade, traffic, or barter, but it puts it under ban as a substance unfit to be kept, and devoted to destruction. It does this from the hour when the act takes effect upon it, while it is still in the hands of those who were, and, but for the act, would be its owners, and before any "process of law" of any sort has been undertaken, or attempted, for its condemnation. It is under condemnation, by legislative decree, just where the act overtakes it on the fourth day of July.

First comes the prohibition that it "shall not be sold;" and the connexion in which this phrase stands, and its relation to other parts of the act, show what is meant by it. It means that *it shall not be vendible.* It shall not be sold to any body, by any body, for any purpose whatever. It shall not be sold to be used within the state, nor shall it be sold to be carried out of the state. The holders shall not sell it in their life-time.: it shall not be sold for the benefit of their creditors; and their heirs and representatives shall not sell it when they are dead.

If the holders were allowed to keep it, and to make personal use of it, as private persons, holding liquors in *very* private houses are permitted to do, by the act, it would retain, in some sense, the quality of property. It would, at least, be something appropriated. It would have a master and possessor, if not an owner. But it would still be contraband. The holders could not sell it to any person for any purpose. They could not sell it to relieve their own necessities, nor to satisfy their creditors, and it could not be sold as assets. It would have no *exchangable value.* As property, possessing commercial or exchangable value, the owners would be as much "deprived" of it as if it had been poured into the sea.

But the holders are not allowed to keep it, and, of course, are not allowed to make any personal use of it whatever. The prohibition to sell is only a part of the denunciation. It shall not be sold, nor kept for sale, nor given away, nor kept to be given away, nor KEPT AT ALL: that is the denunciation. "Nor shall it be kept or deposited in any place whatsoever," says the act. And this is as much a "provision" of the first section as any other in it, and any person who shall violate "any provision" of that section is pronounced guilty of a misdemeanor, and is made liable to severe punishment. The liquor, if not voluntarily destroyed, is to be seized and destroyed by the agents of the law, at the cost of the offender. So long as it is kept it is a public nuisance.

In no sense, then, if the act has any vitality, does this liquor, after the act comes to bear upon it, retain any quality of property whatever, of which the owner can avail himself. The mere keeping of it is criminal. The only safety of the holders from prosecution and punishment is in ridding themselves of it, by

voluntarily destroying it. They are liable to punishment for having it in possession. It is no more property in their hands, available to them either for use or for profit, or even for the pride of dominion, than counterfeit money is property in the hands of the rogue who intends to pass it. They are criminal for possessing it, without any reference to the intent with which they hold it.

In the mean time, it is out of the pale and protection of the law. The possession must belong to the strongest or the cunningest. Any body who chooses may take it wherever he can lay his hands on it, only taking care not to commit an unauthorized trespass, or a breach of the peace. He must take care, also, not to be caught with it on his hands in forbidden places. So much as he can smuggle into his private dwelling will be safe. There is an express provision to protect the trespasser in the sixteenth section. But this was unnecessary. It cannot be the subject of trespass, or theft, or robbery. Larceny can only be committed of property, to which a money value can be assigned. This is a commodity in which the owner retains no interest to which a money value can be assigned. A substance which retains no assignable value, and which it is a misdemeanor to keep at all, cannot be the subject of larceny.

The "process" to which liquor, in the cases I am treating of, is subjected on the prosecution of the unlawful holder, or on its seizure, is not a process for its condemnation as *property:* it is condemned as property already.

I am not here speaking of liquor seized in a dwelling-house, after the occupant is convicted of having violated the act, by selling; there a kind of property remains. Nor am I speaking of liquor seized, to which a "claim" may be interposed—as where it should be imported liquor, in original hands, or in the original packages, and so protected by the paramount law. I am speaking of liquors manufactured at home, or, if imported, so held as to be subject to state authority. Vast quantities of such liquor cannot fail to be in the hands of the business classes, such as I have already referred to, and kept in other than excepted and protected places. When the act speaks of liquor being "adjudged forfeited," the language finds no appropriate application to these liquors. The vessels in which the liquor is contained, when seized, may be "adjudged forfeited," because they are property. But the liquor, itself, is not property when the seizure takes place, and a judgment of forfeiture upon that would be a solecism in language and in law. If it was spurious bank money found on a counterfeiter, an order to destroy it would be just as much a judgment of forfeiture.

In the cases I am considering, no "claim" to the liquor can be asserted by any body, because no body can swear, as the act demands, that he or any other person is the owner, or specify a particular exception in the first section of the act as that under

which it was lawfully kept. When, in any such case, an arrest takes place, the liquor is to be "adjudged forfeited," and to be destroyed, on the conviction of the person arrested, for the offence of keeping it; and he is not convicted for keeping his *property* in a forbidden place, but for keeping liquor, of the ownership of which he has already been divested. When no arrest is made, and no claim is interposed—as no one can be in any such case—the liquor is to be "adjudged forfeited," and to be destroyed, on proof of the service, or posting of notice of the seizure.

It is manifest, that in these cases there is no "process of law" terminating in a judgment of forfeiture against the liquor as *property*, on account of an act of the owner in violation of law, or for any other cause. The holder is not divested of his right of property by any such judgment, for he has none; and, so far as that color or semblance is given to the proceeding, it is utterly deceptive and false. The proceeding is only a prescribed and formal mode of executing a judgment or decree of the Legislature, which itself deprives the holder of all right of property in the liquor, and devotes it to destruction. The act deprives him of his property from the moment it takes effect upon it, and puts such a brand on it, as makes it a high peril on his part, to wait for the ministers of the law to seize and destroy it, instead of immediately destroying it himself.

The truth is, that this formal proceeding, prescribed by the act, is hardly necessary to secure the destruction of the liquor, except as it is a convenient and fitting mode of protecting those engaged in the operation from any legal liability for entering on the premises where the liquor is found, for the exercise of the necessary force in the seizure, and for seizing along with it the vessels in which it is contained. If these liabilities could be avoided, any person in the community, so disposed, might, under this act, seize and destroy the liquor, in the cases I am speaking of, with perfect impunity; no need to wait for an officer of the law, or a magistrate. Any citizen, zealous of good works, in so philanthropic a cause, might himself execute the law on a condemned substance which no body owns. Indeed, it would not be surprising, if ingenious persons should find themselves able to light upon occasions when they can do the state this notable service, in the face of open day, without incurring any incidental liability whatever. As to liability for seizing and destroying the liquor, they may always laugh at that.

In my examination of this act, I cannot see that the legal effect of its provisions on property in liquor, which I have attributed to it, is relieved or varied by any thing else contained in it, or by any consideration arising from without.

It might be thought, at first view, that the holders of liquor, in the cases I have treated of, might sell to those who are specially qualified and authorized by the act to keep and dispense liquor, for certain designated uses; but not so. The prohibition against

selling is general and express; the exceptions are special, and this is not one of them. Importers may sell; those authorized by the second section may sell—only for authorized uses: these are the only parties allowed by the act to sell to the public. The authorized vender can get his supplies, after the fourth of July, within the state, from three sources only—from the importer, from the stock of an insolvent authorized vender, and from the stock of a deceased authorized vender. These excepted cases being expressed in the act, all others must be deemed excluded.

It would be against the manifest policy of the act, that the liquor kept in violation of its provisions should be sold at all, or to any body. It is the clear design of the act to brand such liquor as a commodity not vendible. It is a public offence to hold it, even for an instant, after the act takes effect upon it; it is under interdict; and it would have been absurd if the act had allowed the holders to sell it to authorized venders, while it was a punishable offence in them to keep it, while it is liable, every instant, to seizure as an interdicted substance and a nuisance, and when seized, cannot even be sold by the officers of the law, but must be destroyed.

Besides, if so absurd a construction of the act were admissible, after the limited demands of the authorized dispensers should be supplied, the operations of the prohibitions and denunciations of the act on all that remain—and vast quantities, of great value, would still remain—must be precisely such as I shave described—so much will be under interdict, devoted to destruction, out of the protection of the law, and the daily keeping of it a daily misdemeanor.

Perhaps some may think that the holders of liquor amenable to the denunciation of this act should protect themselves, by becoming authorized dispensers of it under the second section. If this were practicable, there would be small gain in it, in any case—to a brewer, for example. A stock of ale on hand, worth twenty thousand dollars, would hardly be saved by his having the privilege of selling it for "mechanical, chemical, or medicinal uses." But if he happens to reside out of the bounds of the city, where his stock is held, and must be sold, he cannot bring himself within the conditions of the second section, because he will not be an elector of the city. And if a woman, or minors, should be the owners, they would be subject to the same disability. And the act excludes from any rights under this section, by express designation, nearly all those business classes who must, necessarily, be the principal holders of the liquor on which its denunciations fall. Grocers, restaurauteurs, hotel and boarding-house keepers, and keepers of places of public entertainment or public amusement, amongst others, are not allowed to become authorized dispensers of liquor. It was the clear and special purpose of the act to take from all those classes, who have been accustomed to furnish consumers with their supplies, the right to sell for any

purpose. Hence the disability under which they are specially placed in the second section. No one can doubt, who reads this act attentively, that the deliberate purpose was not merely to break up their business, but to divest and strip them of every dollar of property, in the shape of liquor, of which they might be the owners, when the act should overtake them. It was against them that the vengeance of the act was mainly directed.

But an indispensable qualification for a dispenser of liquor, under the second section, is that he should be of "good moral character." There are, probably, many persons, and some magistrates, who conscientiously believe, that no man who has made it his business to manufacture or keep liquor for sale as a beverage, can be of "good moral character." Such a man might find it difficult to bring himself within the qualifications of the second section. But I do not think that there are many lawyers who are prepared to maintain, that the Legislature has the power to make "good moral character" the tenure on which, alone, the citizen shall be allowed to retain or enjoy his property. Yet this would be precisely the effect of a statute which should pronounce sentence of condemnation on private property—liquor, for example—but still allow the holder to retain an interest in it, provided he could prove, to the satisfaction of a magistrate, that he was of "good moral character."

It has been suggested, I believe, in some quarters, that manufacturers, dealers, and others, may save their property, partially, at least, from the operations of this act, not, of course, by selling to be carried out of the state, but by carrying their stocks out of the state, and then selling. It is plain, if this could be done, or should be attempted, it would be in evasion of the act. It would in no way change the character of the act, or its intent and operation in depriving the holders of their property. The liquor would still be a non-vendible commodity in their hands, and devoted to destruction, liable to seizure before it could be smuggled away for transportation, and themselves amenable to punishment for having it in possession. All the act *allows* the holders to do with it, is to destroy it; if, instead of this, they run away with it, it will not be by virtue of the statute, but in contravention of it.

The view which I have now presented of this act, nearly completes all that I have deemed it necessary to offer, in the way of statement, to show its want of validity. The rest is matter of conclusion from the premises, and depends on principles which are not only familiar to every lawyer, but which almost every intelligent person understands just as well.

No man in this state can be deprived of his property, any more than of his life or liberty, but by "due process of law." What sort of judicial proceeding constitutes a "due process of law" for such a purpose, may often be a difficult and perplexing question. It has already been made a vexed question among lawyers

under this act. But one thing is perfectly clear—it must be a *judicial* proceeding of some sort. No lawyer, and no man of intelligence, would think of calling a *legislative* act, depriving citizens of their property, a "due process of law," or any process of law at all. This need not be argued; but this is exactly what the act does, if I have given its construction and operation correctly. The case, as I view it, needs no further argument or illustration; and it follows, that the first section of the act is absolutely void, and so is every other section which goes to uphold it, in regard to all liquor which is condemned by it in the manner stated in this communication. If void as to such liquor overtaken by it on the fourth of July, it is void as to the same liquor, in the same hands, on the fifth, and, as long as it shall be held, thenceforward and forever.

And this is not all. It is equally void as to all liquors in the same hands, and held in the same manner, which shall be subsequently obtained, whether by manufacturing it, or by legal purchase from importers or others.

The act does not prohibit the manufacture of liquor; it does not do it in terms, and it cannot do it by implication. The manufacture is not illegal. The act operates only on the manufactured article. When the malt and the hops, for example, have become ale, it is then the act steps in to deprive the owner of his property. The original materials are property, and they cannot less be property when produced in the new shape of ale. It might be very different if the act, supposing the Legislature had any such power, had made the manufacture illegal. The whole effect of the enactment might, perhaps, have been changed. An article which it should be illegal and punishable to make or produce, might be declared not to be property when made or produced. About all this I give no opinion. But here the act does not pretend to interpose till the article is manufactured. It then declares, it shall not be vendible, and shall not be kept, but shall be destroyed; and thus deprives the owner of his property, without attributing to him any criminal or illegal act, and without any process of law.

What is true of liquor manufactured, is true, also, of liquor purchased of importers. Those who import have a right to sell—at least in the original packages. If they have a right to sell, others have a right to buy. Hotel keepers, dealers, and others have a right to buy. And in their hands, in or out of the original packages, it is property. The act does not declare the purchase illegal; if it might have done so, about which I give no opinion, it has not. It does not pretend to interpose until the liquor is in the hands of the purchaser, and then it steps in to deprive him of his property.

The same principle must, of course, apply to liquor legally purchased out of the state, and brought in, or legally purchased in the state, or of any body. At the time of the purchase, and

the delivery to the purchaser, it is property, and becomes the property of the purchasers; and then it is that the act takes effect upon it—if it has vitality enough to take effect all.

It will be seen, then, that I hold this act to be utterly void. The view which I take of it leaves nothing for its main provisions to operate upon, either on the fourth of July or at any subsequent period. All property in liquors owned by any body, any where, against which the impotent prohibitions and denunciations of the act are directed, in the manner I have stated, must, in my judgment, be held as free from its operation as if it had never been passed.

If any body is disposed to try his hand at an argument, to show that liquor so differs from all other property, which the law protects, as to take it out of the category of property altogether, and make it subject to legislative condemnation, without any "process of law" whatever, why, it is proper he should try. This will be found a difficult task, in the face of this very act, which recognizes liquor as property. If it is property *for any purpose*—"mechanical, chemical, medicinal, or sacramental"—it it will be hard to argue that it is not property. Call it poison, call it fire, call it gunpowder—it is still property, in spite of hard names; it still has value. If not to be used as a beverage, it may be used as a medicine, and has exchangeable value as such. And if it is property *for any use*, no citizen can be deprived of it without "due process of law."

Precedents may be sought for. I think they cannot be found. Analogies may be sought for. I think none but false ones can be suggested. I recognize the power of sovereignty in the state —even where it takes private property; as in the necessary right of taxation. I recognize the Legislature as the guardian and conservator, within due limits, of the public health and the public morals. The Legislature may restrain free trade in money, as by laws against usury. It may prohibit the selling of property by lottery. It may restrict, and tax sales by auction, or by peddling. It may prohibit noxious trades in particular places. It may forbid the keeping, in particular localities, of a substance like gun powder, liable to explosion, or an infected or infectious article or material, likely to breed pestilence, the *bare keeping of which*, and not the use only, is a daily and hourly peril to the lives of whole communities, and it may provide for the summary abatement of such nuisances. It may do very many things for the protection, peace, order, health, and morals of the community, in restraint of personal liberty, and of the free use, employment, and exchange of private property. But in all it has ever done, or all it may do, on the principles involved in any or all of the examples here suggested, no warrant can be found for this enactment. The simple truth is, that there is only one possible ground on which a defence of this act can be set up. It must be assumed, absurd as the idea is, that in the very nature of the

substance, there can be no such thing as property in liquor. But he who puts liquor in such a category, must be prepared to go, or allow others to go, a good deal further. There are those who think tea and coffee always hurtful. There are those who think meats should never be eaten. There are those who think that land should be as free as air and water. There are those who maintain that all property is robbery—"*la propriete c'est le vol.*" Any faction, in possession of political power, adopting any one of these notions, might proceed to carry out their views by legislation. And they might find a precedent, in this enactment, for any act of absurdity or iniquity they might choose to commit.

I raise no question here, and offer no opinion, about the power of the Legislature to regulate or restrain the trade in liquor, or to prohibit the domestic traffic altogether. The restriction, and even the prohibition, if admissible at all, of *trade or traffic* in liquor, might be made to consist with a better respect for the rights of property than this act manifests.

I raise no question, and offer no opinion, about the power of the Legislature to make the unlawful selling of liquor within this state a public offence, punishable by fine and imprisonment, and by the forfeiture and confiscation to the use of the state, of the liquor found in the possession of the offender. Such a measure might, also, be made to consist with a better respect for the rights of property than is shown in this enactment.

I raise no question, and ofier no opinion, in regard to the just limitations of legislative authority, when, in pursuing any object of common good or general benificence, its measures impair and lessen, *incidentally and by consequence*, the value, advantages, or benefits of private property, or the profits of capital and industry employed in any lawful trade or occupation. I know well, that, besides the large amount of property in liquor directly invaded by this act, it is so contrived as to subject to sudden, wanton, and unavoidable sacrifice, other property, to an amount vastly greater still, involved as capital, and otherwise employed, in pursuits which have had the sanction of law and of public usage in this and in all civilized countries, from the foundation of civil society. But in this argument, I do not take this sacrifice of private property, unnecessary and cruel as it is in the very conception, into account. I rest here upon the *direct* operation and effect of this enactment upon the rights of property where it is not so easy to involve the question at issue, in a labyrinth of difficult distinctions and in endless disputations, or to evade the force of objections fatal to the act.

Drunkenness is a monstrous vice, and temperance is a great virtue; but legal and forced abstainance is no virtue at all. Without some freedom, and some temptation, there can be no moral discipline and no moral progress. Discreet legislation, firmly enforced, may do much to aid reform; but violent and extreme measures of moral reform are always extreme follies.

The use of pleasant beverages will cease universally, just when there shall be no more savory viands, and all men shall live on dried peas and acorns. Prohibitory acts aim at impossibilities. This would be little, if they did not aim also at the exercise of unseemly authority. They seem to be experiments, repeated with modifications, to see how far legislative bodies may go in violation of fundamental laws without rebuke and rebuff. They pass the limits of a just and safe constitutional power, and enter on a broad field of undefined and indefinable prerogative. This is dangerous ground for legislation to occupy, and, in my judgment, the sooner it is abandoned the better.

This letter has swollen to twice the length which I supposed it could attain when I commenced it. If my strength was equal to the task of revision, I would make it shorter. You must take it as it is; and you are at liberty to use it as you please. It has no claim to be considered a lawyer-like performance. Lawyers and judges, if their eyes ever rest upon it, may find it very imperfect. It is a communication from one humble citizen to another citizen. It avoids all technicalities.

The argument, if argument it may be called, addresses itself to the common understanding of all, and, possibly, it may be found useful in enabling others, as well as yourself, to understand the general character, tenor, effect, and tendency of the enactment in question, and some of the limitations which great principles of original and inalienable right, out of, as well as in, the the Constitution, impose on the sovereign power of the state.

I am, my dear Sir,

Faithfully your friend,

D. D. BARNARD.

OPINION OF

NICHOLAS HILL, JR., ESQ.,

ON THE PROHIBITORY LIQUOR LAW.

The bill, after prohibiting the selling or givingaway of intoxicating liquor, except by certain persons, and for specified purposes, proceeds to make the mere act of keeping or depositing it, with certain qualifications as to the place and intent, a cause of *seizure, forfeiture, and destruction.* And the first question I propose to consider is, whether, the means prescribed for effecting the latter object are consistent with the Constitution.

There is no doubt that intoxicating liquor—one of the subjects of this process of seizure and forfeiture—is *property;* and that it remains so until the period when judgment of forfeiture is finally pronounced.

See 6 Law Report. 622, 634, N. S.; 1 Curtis' R., 311, 32-9; 33 Maine Reports 558, 561.

Whether it can be levied on and sold, under an execution against the owner for debt, on the ground that the prohibition against selling relates only to voluntary and private acts, and not to sales *in invitum*, by public officers, need not be considered.

See 3 Pick. R. 323.

On his death, however, at any time before judgment of forfeiture, it will clearly pass to his executors or administrators as a part of his personal estate, and may be the subject of distribution by them, if not of sale, for the payment of debts, &c.

2 R. S. 82, 3; Id. 87, 96-7; § 3 of bill.

Nor is there any thing in the anomalous clause declaring all liquor unlawfully kept, to be a public nuisance, which prevents it from being considered and protected as *property.* Even if the clause is valid, the liquor is not declared a nuisance *per se*, but becomes so, in the judgment of the Legislature by the mere manner in which it is used or kept. (Section twenty-five.) The legal effect of the provision need not be traced to all its practical consequences. Assuming for the present that it is valid, and gives all the rights arising from the existence of a nuisance at common law, one of these may be the right of abatement by private force. The most that can be done, however, in the ex-

ercise of this right, if it exists, which I utterly deny, is to remove the nuisance; not unnecessarily to destroy the property.

See 7 Dana's R 376 et seq.; 1 Strange's R. 686, 688-9; Chitty's Prac. 654; 9 Barn. & Cres. 302; 2 Harris' R. 306-7; 15 Wend. R. 398, per Circuit Judge; 1 Green's R. (Iow.) 348.

Conceding, however, that a person may even destroy it under color of the remedy by abatement, does it cease to be property because of its exposed condition in this respect? I think not. Take the extreme case of gunpowder, kept in such a manner as to render it a public nuisance. It is property, nevertheless, and as such, is protected by law. For depredations upon it, except to remove the nuisance, the aggressor would be liable; if a thief, to indictment; and if a trespasser, to a civil action.

True, there is another part of the bill, which, in effect, and in certain cases, disables the owner from maintaining a civil action for the possession or value of liquor unlawfully kept, if *taken, detained, or injured.* (Section sixteen.) And it may be admitted that the design was to sanction, if not *invite*, every species of depredation of this kind, though done from mere malice, and without any intent to redress the supposed public wrong; nay, though the express object of the aggressor was to *repeat or continue the public wrong for his own emolument.* The unqualified tender of impunity which the bill strangely makes to him, does, indeed, seem to contemplate all this; but what is the effect upon the question of property, supposing the provision to be valid? The title of the owner is not extinguished. While he remains in possession of the liquor, it is his property, and as such, he may defend it against unlawful aggression by private force. Even after he is dispossessed, moreover, he may pursue and retake it by virtue of his original title, if he can do so without committing a breach of the peace. And if stolen from him, while unlawfully kept, no one will probably contend that the thief can escape punishment on the ground that the liquor had ceased to be property, and become an object of *lawful plunder.*

To infer that an article is not property, because the protection of the public force is partially withdrawn from the owner, or because it is *liable* to be destroyed under pretence of abating a nuisance, seems to me at variance with common sense as well as law. After the liquor has been deposited, in a forbidden *place*, or in a proper place, for a forbidden *purpose*, the owner my change its locality, or his intent, and thus entitle himself to complete protection in keeping it. And the most we are authorized to say of it afterward, is, that it has been in a situation of exposure and peril, and has been rescued; not that it has ceased to be property in the meantime, even for a moment.

I have thus far considered the question of property upon the theory assumed by the bill, and irrespective of any distinction as to the manner in which the liquor is kept. Whether the owner keeps it lawfully or unlawfully, it is his property, and remains so until he is

deprived of it by some *authorized proceeding*. But by way of testing the system of measures, prescribed for the purpose, it is enough to assume, what the bill expressly recognizes throughout, that a person may lawfully acquire property in liquor; that he may keep it in his dwelling-house, for personal use, or to be given away; that he may transport it from one place to another, and in so doing, deposit it in a warehouse; and that he may even sell it as a useful article, for some purposes, on complying with specified regulations. Indeed, the entire process of *forfeiture*, prescribed by the bill, necessarily pre-supposes the existence of property in the liquor; something for a judgment of forfeiture to operate upon, something and which, until forfeiture, has an owner.

1 Curtis' R. 838-9, Curtis J.; 6 Law Report. 324, Shaw, Ch. J.; 33 Maine R. 561-2, Shepley, Ch., J.

Can the owner be deprived of it by the process which the Legislature has deemed proper to prescribe for that purpose?

The Legislature is not omnipotent. Like other departments of the government, it can only exercise "such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the humblest magistrate who transcends his jurisdiction, are void."

4 Hill's R. 144, Bronson, J.

What measure of power it can lawfully assume under the general grant in the third article of the Constitution, has been a subject of considerable doubt and discussion. It must clearly be mere "legislative power," and all attempts to exercise *judicial* functions, under color of the grant, are mere acts of usurpation, without validity or force.

Art. 3 § 1; see 5 Hill 367-8; 2 Peters' R. 657; 5 Cowen's R. 346, 350; 2 McCord's R. 55, 62; 4 Dev. 1 et. seq.; 3 Greenl. R. 326; 10 Yerg. R. 59.

Even independently, therefore, of any express constitutional *restriction* imposed upon the Legislature, it is more than doubtful whether a statute, depriving a man of his property, without a trial, can be upheld. It would be a *sentence*, rather than a *law*.

See 2 Peters' R. 657, Story, J.; 4 Hill 144-5; 9 Gill & Johns. R. 408 et. seq.; 1 R. M. Charlt. R. 332-3; 5 Hill 359 to 368; 13 Wend. 328-9.

But the Constitution expressly declares that *no person shall be deprived of life, liberty, or property, without the process of law.*

Art. 1, § 6.

This clause was derived from *Magna Charta*. It originated in an age when sovereigns assumed to charter the people, instead of being chartered by them; when private rights were regarded but as so many encroachments on royal authority—the fruits of prosperous rebellion, or at best, the concessions of gracious princes to their subjects, revokable at pleasure. In England, from the very structure of government, the principle could only exert a moral power in restraining what is called the "Omnipo-

tence of Parliament;" but its effect is far different with us. It invests the rights of property with a sacredness equal to those of *life or liberty*, grouping them together and ranging them in the same class; and having done this, it places them all *above and beyond the reach of the Legislature.* Almost every state of the Union has embodied this clause in its Constitution, and the interpretation it has received from the courts, leaves no doubt of its true meaning and proper application. Its general object was to prohibit invasions of private rights by the mere exercise of sovereign will; to interpose the protecting shield of the *judiciary* between the citizen and the government; and to render him secure against forfeitures of every kind, except for guilt *judicially ascertained.* Accordingly, the words *due process of law*, have always been understood as securing to him the benefit of a trial, and any bill, purporting to deprive him of his property, without tendering this privilege, is absolutely void.

See 4 Hill's R. 140, 145-6; 9 Gill. & Johns. R. 408 et seq.; 4 Dev. R. 11 to 16; 6 Law Report. 1 R. M. 637-8; Charlt. R. 332-3; 1 Curtis' R. 311; 7 Porter's R. 294; 1 Haywy. R. 28-9; 1 Murphy's R. 87, 88; 16 Penns. R. 256; 5 Hill's R. 359, 360; 3 Story's Const. 661.

The clause under consideration, however, secures more; it calls for a trial, not only, but a trial according *to the course of the common law.* The mere semblance of a trial—the form without the substance—will not answer. The process must be such as gives the unconditional right to a trial in the common law sense of the term, at least in all essential particulars. A trial according to the course *of the civil law* is not a compliance with the condition; nor is a trial by *arbitration;* nor by *commisioners;* nor by the *Legislature;* nor by an *inquisition;* nor, it is believed, by any other unusual or exceptional process.

See 4 Hill's R. 140, 145-6; 6 Greene's (Iow.) R. 15; 6 Law Reports, 638, N. S. 1 Hayw. R. 29; 5 Cowen's R. 346; 4 Dev. R. 11 to 16; 3 Pet. R. 446-7; 11 How. R. 437; 2 Greene's R. (Iow.) 15; 5 Pennsylv. R. 207-8; 15 Penn. 18, 20; 16 id. 266-7; 11 id. 489; and see Leiber on Civil Liberty, 87.

It must be a trial which, at least, secures the right of appearing and controverting the accusation made; of adducing and cross-examining witnesses; and of having all doubtful questions of fact resolved by the verdict of a jury.

See 6 Law Reports 636, 638, N. S.; 1 Curtis' R. 311; Leiber on Civil Lib. 87; 1 Hayw. R. 28-9.

If, therefore, the process prescribed by this bill shall be found wanting in these, or any other, essential elements of a trial, it is so far void, and can not be lawfully enforced. And in inquiring whether the Constitution has been complied with, we are to consider the nature of the process itself, and the privileges which it actually *secures*, not the mere name given to it by the Legislature. That body can not comply with the conditions imposed by providing any kind of process which its members think proper to *call a trial;* but whether it is so, in fact, must be determined by the judiciary. If an attempt should be made, for example, to

substitute an *ex parte* hearing of the complainant for a trial, or hearsay for evidence of guilt, or the act of issuing a warrant for a judgment, all men would agree that the Constitution had been violated. It must be complied with completely—without reservation, without conditions which render the guaranty a barren abstraction; and the citizen is not to be tantalized by evasions, nor is he bound to accept a juggle, or cheat, as a substitute for his right.

See 11 Penn. 494–5; 2 McCord's R. 55, 61–2; 3 Seld. 9, 45, 93; 1 How. R. 311, 317. et seq.; 2 id. 608, 612, 613; 1 Curtis' R. 311 et seq.; 4 Gill. and Johns. 109; 16 How. R. 314, 326–7.

There is no doubt that the bill purports to be a penal statute, and that the proceedings under it are *criminal* in their nature.

1 Curtis' R. 328.

It must not be confounded, therefore, with statutes regulating mere civil remedies, where a trial, in the common law sense, may or may not be required, according as other provisions of the Constitution apply or not. Even if such a trial can be dispensed with in cases of that kind, it is impossible to say it can be in this, without surrounding the whole principle, and placing *life and liberty*, as well as *property*, at the mercy of the Legislature.

5 George R. 206 et seq.; 1 Saxt. R. 725–6.

Nor am I to be understood as saying, that none of the common law *forms* of the process may be altered without violating the Constitution. Changes of this nature, so long as they operate mere modal differences, and do not trench upon the substantial *rights* intended to be secured, may indeed be made. But the principle of the entire process, and every thing *essential* to its full and efficient operation, must be left unimpaired. So far the ground is consecrated and forbidden, and the Legislature can not invade it, until the people, who made the fundamental law, think proper to abrogate it.

See How. Miss. R. 104–5; 5 Smedes & Marsh 664; 4 Conn. R. 538–9; 5 Penn. R. 207–8; 2 Dallas' R. 308; 3 Seld. 9; 8 Wheat. R. 75–6; 1 How. R. 311; 2id. 608.

Does the bill tender and secure to those who may be deprived of their property under it a trial in the sense of the Constitution? A careful examination of its provisions has brought me to the conclusion that it does not.

The initiatory steps prescribed for obtaining a judgment of forfeiture are substantially as follows: 1st. There is to be a complaint, which may be made before any justice of the peace, police justice, or other magistrate named. It is to be in writing, and on oath or affirmation, and must state that complainant has *reason to, and does believe*, that liquor is unlawfully kept or deposited in some specified place; no matter whether by the owner or not. The facts on which this *belief* is founded need not be verified by the complainant, but may be sworn to by some other person;

nor need these facts appear in the complaint, or even in writing. There is nothing compelling a disclosure of the *name* of the supposed offender, and whether it shall be disclosed or not, is left to the option of the person or persons thus sworn. (Section six.) 2d. On this evidence, of which the most important part has, perhaps, no better memorial than the frail recollection of the justice, he may issue a search warrant. This must describe the suspected place, as well as the things proceeded against, and command the officer to search for and seize the liquor, with the vessels in which it is contained, and store them in *some safe and convenient place.* The warrant is not to contain the name of the supposed offender, even if disclosed by the preliminary proof; but in that case, a separate warrant for his arrest is to be issued. These warrants, for aught appearing in the bill, may be placed in the hands of distinct officers, so that one may carry the accused before the magistrate, while the other is taking the property to such other place as he deems proper. 3d. The officer seizing the liquor, except in cases where the owner shall have been arrested, is forthwith to give written notice to him or his agent, if known. The notice must describe the liquor and the vessels in which it is contained, as near as may be; and it must specify the name of the magistrate, the name and residence of the seizing officer, and the time of seizure. The accused is not to be informed, it will be seen, of the *place* where his property may be found, nor is he to be summoned to answer for the supposed offence, nor even notified *to appear at any fixed time or place.* 4th. The mode of serving the notice is made to vary according to circumstances, and depends much upon the good faith and discretion of the seizing officer. If he *knows* the owner, or his agent, he may deliver the notice to the agent, though the owner is equally accessible. Or he may pass by both, and leave the notice at the residence of the one or the other, with any person of *mature age who happens to reside on the premises.* Where these facts are not known to the seizing officer, the notice may be served by delivering it to some person of like age residing or being employed in the place of seizure; and if none such can be found, by *posting* the notice in a specified manner. (Section seven.)

On proof that these steps have been complied with, by the return of the officer, or otherwise, the magistrate, according to the bill, may, after thirty days from the serving of notice, proceed to judgment of forfeiture, provided no one has appeared in the mean time, and made affidavit, so as to entitle him to be heard. (Section seven—eighteen.) It will be, at least, admitted, I think, that such a mode of acquiring jurisdiction, for the purposes of criminal forfeiture, has no precedent in any legislation which the courts have not pointedly condemned. And without noticing all its objectionable features, I propose to consider only four or five of the more prominent ones—enough, however, to characterize the entire process:

1. The process provides for no summons, citation, or notice to *appear at any fixed time or place, for the purpose of controverting the accusation.* True, it pre-supposes, that a party thus circumstanced will, probably, appear at some uncertain period within thirty days, and obtain permission to be heard, if he can find the magistrate; but it appoints for him no *day*, and secures him no *standing in court*, to enable him to meet either his accusers or the magistrate, and ask to have the complaint dismissed, for irregularity or want of prosecution. If the magistrate should absent himself for the period designated, moreover, or be disabled from attending to his duties by an interposition of Providence, the judgment of forfeiture will not be arrested thereby, but may, nevertheless, be rendered immediately after the time limited.

Section 18; and see 6 Law Report 636, et. seq. N. S.

2. The judgment may be obtained, moreover, according to the provisions of the bill, *without any notice whatever to the owner.* The bill does not require that his name, or that of his agent, should appear in the search warrant, or that the *magistrate* should be informed who they are. The manner of serving notice is, therefore, necessarily dependent upon what the seizing officer knows, or may learn, with respect to the owner or possessor. If he returns the name of some one as owner or keeper, together with the fact of personal notice having been delivered to him, nothing more is requisite to uphold the judgment. (Section seven—thirteen.) He, of course, must often act on mere hearsay, and the best information he can obtain, and however honestly he endeavors to ascertain the truth, will often be mistaken in this respect; and then "*the property may be confiscated and destroyed, without any notice given to the true owner to appear and defend.*"

6 Law Report 634–5, N. S., Shaw Ch. J.

3. The owner, moreover, is entitled to no hearing whatever upon the *original accusation.* Indeed, he is not treated by the bill, after the seizure of his property, as a *defendant* in a criminal prosecution, unless he is so fortunate as to be arrested; nor does it pretend to secure him any of the privileges incident to that relation; on the contrary, it proceeds upon the theory, that the accusation is sufficiently established by the preliminary testimony, and that judgment of forfeiture is due, and must be pronounced, unless he assumes the attitude of an actor or *claimant*, with the burden of *proving his innocence.* His first appearance before the magistrate, therefore, if he appears at all, is to be in the character of a convict; one whose guilt has been already established presumptively, and who asks to save his estate from forfeiture by disproving the accusation. The accuser or accusers need not appear against him, and he is not secured any opportunity of cross-examining the witnesses on whose testimny the

warrant is issued, nor is he even secured the right of knowing what *facts* have been sworn to. If he is not content to appear on these terms, the *ex parte* decision made on granting the warrant is to be deemed a *trial*, and no further evidence of guilt is necessary, or even allowed, before pronouncing final judgment; and if he does appear, but fails to *prove his innocence*, the result is the same.

Section 7, 13; and see 6 Law Report 638–9, N. S.

4. But to the above conditions thus annexed to this extraordinary tender of a hearing, others equally, and even more, objectionable are added. Among the latter is one requiring the owner to prove his innocence by his own affidavit, and to disclose the particular facts demonstrating it, with various others which may be used to convict him of the offence, if any has in truth been committed. (Section thirteen.) The affidavit is not to be used *for him* on the contemplated hearing, but is made essential to his right to be heard at all; it is to operate as a burden, but not as a boon. The practical operation of this may be readily foreseen. If the owner is guilty, he must furnish evidence to be used against himself in any other criminal prosecution, or his property is to be forfeited, thus trenching on another right secured by the Constitution.

Const. art. 1, §6.

And so, though entirely innocent, and a prosecution is threatened, he must be content to lose his property, unless he is willing to hazard the disclosure of circumstances which may be used to his prejudice then, or afterwards. (Section seven—seventeen.) I do not believe that any Legislature, except the one which passed the bill in question, ever thought that the constitutional requisitions of a trial, especially in *criminal* cases, could be complied with in this way. A hearing on condition that the accused shall not be confronted by his accusers, or have the privilege of cross-examing the witnesses against him, or the benefit of the ordinary presumption of innocence! A hearing, if he will first swear that he is innocent, and then disclose facts and circumstances which may form important links in a chain of testimony tending to convict him!! The statutes passed in Massachusetts and Rhode Island, both of which have been pronounced unconstitutional, stopped far short of this.

See 6 Law Report 622, N. S.; 1 Curtis' R. 311; 7 Porter's R. 293, 366 to 368, 378 to 387.

The argument in favor of such enactments must be, that if the accused is innocent, he may safely comply with the prescribed conditions for a hearing; and if he is guilty, he ought to be punished, and has no just ground of complaint. The Constitution, however, proceeds upon no such fanciful theory as to the security of innocence; nor does it countenance the right of punishing even the guilty, except *after due process of law.*

5. Again, we have seen that the constitutional requisition, as to "due process of law," includes the rights of *a trial by jury.*

See 6 Law Report 638; 1 Curtis' R. 311; also the cases cited above.

Whether this calls for a jury of twelve men, especially in criminal cases, or may be satisfied by a less number, is a question on which wise men have doubted.

See Conv. Deb. of 1846 p. 544, et seq., Atlas ed.

But the provision for what the bill calls a "trial of such *claim*"—i. e. the hearing above spoken of—secures no jury of any kind. After the affidavit is interposed, the proceedings are to be in all respects such "as are provided in section fifth." (Section seven.) That provision is as follows: "At the time of *joining issue*, and not after, *either party* may demand a trial by jury, in which case a magistrate shall cause a jury to be summoned," &c., as in other criminal cases in courts of special sessions. (Section five.) This applies obviously and exclusively to "a trial of the *complaint*," which is spoken of throughout the bill as a thing entirely distinct from "a trial of the *claim.*"

See § 14, 17, 21.

Where a search warrant only is issued, there is no provision for a "trial of the complaint," nor for "joining issue" on the claim. These are terms of settled import, pertaining to legal science, and the Legislature, when using them in reference to legal proceedings, is presumed to have used them in their technical sense.

4 Pick. R. 405, 410, 411; 4 Mason's R. 232, 236; 1 Pick. 210; 5 Humph. R. 392.

When there is to be a "trial of the complaint," it is easy to see what constitutes the *joining of issue.*

The warrant then recites the accusation;

2 R. S. 706 § 3:

the accused is brought into a court; the charge made, as stated in the warrant of arrest, is to be distinctly read to him, and he required to *plead thereto.*

2 R. S. 712, § 7; Barb. Cr. Law 525, 536-7.

But how is an issue to be joined with a view to the "trial of a *claim*," the owner not being arrested? The bill makes no provision for his arraignment, nor for any thing in the nature of it; nor for requiring him to plead. Indeed, he may not be the person suspected of being guilty, for the warrant can be issued for the supposed misconduct of the *keeper.* (Section six, seven, —.) The owner is, therefore, not even a party to the proceeding, until he elects to become so by presenting an affidavit disclosing his claim. The charge, as *stated in the warrant*, is not to be read to him, for it is a mere search warrant; and besides, it need not be returned till the day for rendering judgment, if it must be even then. (Section six, seven, thirteen.) If the complaint is deemed the

counter allegation, to which he is to plead by affidavit, there will obviously be no *issue;* especially as the former may state nothing more than mere *belief*. But the substantial answer to the suggestion is, that the right of trial by jury belongs to *both* parties when it exists, and must be claimed at the *time of joining issue.* And to hold that the act of presenting the affidavit is joining issue, therefore, would clearly be a misapplication of the provision; for the complainant would have no means of knowing when the act was to be done, so as to avail himself of his right. The result is, that the trial of every *claim* must necessarily take place before the magistrate alone, *without a jury;* no matter how large an amount of property may be involved, nor what suffering may follow from his decision.

Without adverting, at present, to other anomalies sanctioned by the bill—such as allowing one man's property to be forfeited for the unauthorized act of another, by a proceeding against the latter alone—I have no doubt that this entire system of search and seizure is utterly void, and that no part of it can be enforced. I have found it difficult to speak of the process devised for this purpose, with the respect which is due the legislative department of the government. Some parts of the scheme seem to evince a spirit of bold defiance of the Constitution, and others, a studied effort to evade its claims. The two things—the bill and the Constitution—stand in direct antagonism to each other. The Constitution requires a judicial ascertainment of guilt, by *due process of law*, or, at least, the right to it, before a man can be "deprived of his property;" and this the bill refuses. The former contemplates an unambiguous, as well as unqualified, guaranty of this great privilege, while the other, tenders a meager and worthless substitute, and clogs even that with conditions. The one calls for a trial, so that the accused may be confronted with his accuser, cross-examine the adverse witnesses, and be shielded by the ordinary presumptions of innocence; but the other directly reverses all this. And while the one contemplates a trial in the Anglo-Saxon sense—a trial by jury, if not a jury of *twelve men;* the other proffers an inquisition before an inferior police magistrate. Such a mode of confiscating property to an unlimited amount, cannot be upheld except by a decision which shall abrogate the fundamental law, and place the Legislature above the people; the *creature* above the *creator.* It is not a trial in any sense; much less in the sense of the Constitution. Though clothed with some of the forms of a judicial proceeding, and named a trial, it is, to adopt the language of Mr. Justice Story, but a "*solemn fraud.*" And the judgment which is sanctioned "amounts to little more in common sense and common honesty, than the sentence of that tribunal which first punishes the party and then hears him—*Castigatque Auditque.*"

3 Sumn. R. 607-8; 6 Law Report. N. S. 636 to 639; 5 Georgia R. 206-7; 1 Curtis' R. 311; T. Charlt. R. 235; 4 Mason's R. 336; 3 Peters' R. 446-7. and see the cases cited above.

But, apart from this scheme of search and seizure, the bill is unconstitutional in many other respects. One part of it provides as follows: "No person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, *taken*, *detained*, or *injured*, by any other person, unless he shall prove that such liquor was sold according to the provisions of this act, or was *lawfully kept* and owned by him." (Section sixteen.) I have before shown that the bill not only allows the purchase of this species of property, but treats it as a useful article for chemical, mechanical, and medicinal purposes, and thus encourages investments in it as a fair subject for trade and commerce. The provision above quoted contemplates all this, and it assumes, also, that after the property has been thus acquired, it may be *wrongfully* taken, detained, or injured, by another without right, while *lawfully kept*. And it then declares that an owner thus injured, however innocent, shall have no remedy unless he is able to, and does prove, affirmatively, that the property was not *unlawfully* kept. To appreciate the full tendency of this restriction, we must bear in mind that the question of unlawful *keeping* must frequently depend upon the mere psychological fact of intent—a fact which, until evinced by some *overt act*, can neither be proved or disproved by third persons.

See Best's Princ. of Ev. 9; 6 Law Report N. S. 637-8.

For example, liquor may be kept not only in a dwelling-house, but in various other places specified in the bill, and then, whether it is *lawfully* kept or not, will depend entirely on the state of mind or purpose of the owner or keeper. (Section one, et. seq.) Suppose that while it is thus kept by the owner, and before he has evinced, or even conceived any intent to sell, it is wantonly injured or maliciously taken away. The bill says he shall have no remedy except, upon the impossible condition, that he will prove *affirmatively the absence of an intent to sell!* Can the Legislature impose such a restraint without violating the Constitution? Even if the power should be found lurking in some vague clause of our state Constitution, can it be exercised consistently with the Constitution of the United States? I am of opinion that it cannot.

The Constitution of the United States forbids the states from passing any law "impairing the obligation of contracts." And the prohibition is not limited to mere executory contracts, but extends, also, to executed ones; to *titles*, as well as *promises;* to *personal*, as well as *real* estate; in short, to every species of *property*.

3 Story's Const. 240 et seq.

True, whatever belongs merely to the remedy may be the subject of state legislation. But if, as in the present instance, a state, under pretence of regulating the *remedy*, incumbers it with conditions which render it worthless, and thus trenches upon the

right, the act is utterly void. The following language of Mr. Justice Washington, who delivered the opinion in

Green v. Biddle, 8 Peters' R. 1,

though used in reference to real property, is equally applicable to this question. "Nothing," he observes, "can be more clear upon principles of law and reason, than that a law which denies to the owner of land a remedy, &c., or which clogs his recovery of possession by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a *want of right* to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is *impaired* and rendered insecure, according to the nature and extent of such restrictions."

Id. 75-6.

He then proceeds to show that the objection to a law, on this ground, can never depend upon the degree of change which it effects in the *right* of the owner, provided it is interfered with at all.

Id. 84-5, and see S. P., 1 How. R. 311, 315 to 319; 2 Id. 608; 33 Maine 558 et seq.

The Legislature may, perhaps, by laws operating as to future acquisitions, prohibit the citizen from acquiring *any property whatever in liquor*, and thus extinguish both the right and remedy at once. But it cannot do what this bill has attempted, viz: treat an article as a fair subject of commerce, invite investments in it, as property, and then practically withhold all remedy for depredations upon it while *lawfully* kept and used. Such a course of double-dealing is neither honest nor constitutional, and is, fortunately, beyond the sphere of state legislation.

See 33 Maine, 558, 562-3.

The provision that "all liquor *kept* in violation of any provision or provisions of this act, shall be deemed, and is hereby *declared, to be a public nuisance*," is to be regarded, I think, as a part of the same general scheme. Though separated in the bill from the clause last above quoted, the two are intimately connected in policy and principle, and should be looked at together, especially if both are understood to license the destruction of property by private force. I have already said that the nuisance clause, even if valid, does not give this right, and cited some authorities to show that the doctrine of abatement, by private force, could not be applied, from the *nature of the case*, to such an offence. That remedy cannot be invoked, moreover, for another reason. The offence, though called by an old name, is essentially new, especially so far as it is made to depend on the mere intent with which the property is kept. Nothing like it, at least, nothing identical with it, existed before, either by statute or at common law. Previous laws have generally taken cogni-

zance of affirmative *acts*, not *intentions*, and have been content to regulate outward conduct, without trying to *search the heart.* True, the common law imputed to those who "took measures to imprison the King," an actual *intent to compass his death*, and punished them for treason.

Fost. Cr. Law 195; Best's Pr. of Ev. 344-5.

But even there, it professed to deal with the *measures* taken—the open, visible acts of the party—facts susceptible of being proved and disproved in a court or justice by third persons. The bill in question, after *creating* an offence before unknown, points to various kinds of process by which it may be punished, and these alone, I think, can be resorted to.

See 1 Salk. 45; Croke's Jack. 644; 7 Gill. & Johns. R. 290; 2 Hale's P. C. 5; 2 Burr. R. 803; and see 5 Johns. R. 175; 26 Wend. 91.

The principle established by the cases would probably exclude the remedy by indictment, as well as abatement, and confine the prosecutor to such as the bill expressly prescribes, especially as these appear to be quite ample, both in number and severity.

Sections 4, 5, 6, 7, et seq.

But suppose the clause is to be so construed as to authorize the *destruction* of this species of property, when unlawfully kept, under pretence of abating a nuisance, can it be upheld? Its practical effect, when taken in connexion with the clause creating the artificial presumption of guilt, would be to authorize the destruction of property *lawfully* kept, unless the owner was a licensed vender. For the restriction implied by the words "unlawfully kept," is of no value, and might as well have been omitted, so long as the remedy is made to depend on a condition with which the owner *cannot possibly comply.* Viewing the two clauses together, therefore, the bill invites indiscriminate agression upon this species of property, whether lawfully or unlawfully kept. And while it professes a willingness to redress the wrongs of an innocent sufferer, it does so only to ensnare him into a lawsuit in which he must inevitably fail. Thus, the Legislature first *adjudges* that his intent was wrong, and then challenges him to prove the contrary.

3 M'Lean's R. 539, 540, 541.

It "keeps the word of promise to the ear, and then breaks it to the hope." With one hand it holds out a boon to decoy, in order to strike a fatal blow with the other.

It is too often thought that, as the law of evidence relates generally to remedies, it may be modified at the will of the Legislature. This is so where the Legislature confines itself to mere modal changes, but not universally so, when the security of life, liberty, or property is concerned. Then, the Constitution interposes, encircles the citizen, and bids legislators abstain from touching rights which it has consecrated. The importance of this branch of the law has been spoken of, by one capable of

appreciating it, thus: "The rules of evidence, as they are settled for the general administration of justice, are not to be overruled or tampered with. They are founded in the charities of religion —in the philosophy of nature—in the truths of history, and in the experience of common life; and whoever ventures rashly to depart from them, let him remember that it will be meted to him in the same measure, and that both God and man will judge him accordingly."

Lord Erskine, 24 How. St. Trials 965-6; 1 Greenl. Ev. § 584.

I have thus answered a part of the questions submitted to me. Other portions of the bill are equally objectionable with those above noticed. My views as to these will be presented hereafter, at the earliest practicable moment. It has been suggested that the defects of this scheme, as a practical system of measures, may be aided by a large exercise of the power of interpretation; and that it may thus be molded and fashioned by the courts so as to stand. This is hoping for more than the judiciary can do, without usurping *legislative* functions. The defects are too radical and lie too deep to be remedied in this way. Judges can decide, but not legislate. They can declare what a law is, but not make or alter one. With omissions and excesses in legislation they have nothing to do, except to obey the expressed mandate, if valid, or annul it, if void. Accordingly, whenever the judiciary has been appealed to, in modern times, to save such an enactment by interpolating provisions not plainly expressed, the judges have answered as Chief Justice Shaw did: "In order to judge of the conformity of the enactment to the requisites of the Constitution, we must be governed by the terms and provisions of the act itself, and cannot construe it according to any presumed intention of the Legislature not expressed. In a law directing a series of measures which in their operation are in danger of encroaching upon private rights, vesting in subordinate officers large powers, which, when most carefully guarded, are liable to be mistaken or abused, and which are to direct, limit, and regulate the judicial conduct of a large class of magistrates, it is highly important that the powers so conferred, and the practical directions given, be so clear and well defined that they may serve as a safe guide to all such officers and magistrates in their respective duties; and in these respects *the statute itself must, on its face, be conformable to the Constitution.*"

NICHOLAS HILL, JR.

OPINION OF THE

HON. RUFUS CHOATE,

CHARLES G. LORING, SIDNEY BARTLETT, AND ELIAS MERWIN, ESQ'S.

ON THE CONSTITUTIONALITY OF THE

PROHIBITORY LIQUOR LAW.

GENTLEMEN:—I have carefully considered the recent "Act concerning the Manufacture and Sale of Spirituous and Intoxicating Liquors," and now proceed to state the conclusions at which I have arrived in regard to those portions of the act upon which you have requested my opinion.

The act directs the seizure of liquors in two classes of cases: first, by certain officers designated, without any preliminary warrant or process; and second, by virtue of a warrant of search, to be issued by some justice of the peace or police court, on complaint made for that purpose. I propose to consider them in this order.

I. Sections thirteen and thirty-one, which direct the seizure without process, may be considered together, and are as follows:

"SECT. 13. Any mayor, alderman, selectman, sheriff," &c., "may, without a warrant, arrest any person or persons whom they may find in the act of illegally selling, transporting, or distributing intoxicating liquors, and seize the liquors, vessels, and implements of sale in the possession of said person or persons, and detain them in some place of safe keeping, until warrants can be procured on complaint made for the trial of said person or persons, and for the seizure of said liquor, vessels, and implements, under the provisions of this act."

"SEC. 31. It shall be the duty of any mayor, alderman," &c., "if he shall have information that any intoxicating liquors are kept or sold in any tent, shanty, hut, booth, stall," &c., "to seize such liquor and the vessels in which it is contained, and arrest the keeper or keepers of such place, and take them forthwith, or as soon as may be, before some justice of the peace or police court, with the liquor and vessels so found and seized, and to make complaint for the arrest and trial of such person or persons, and for the seizure and confiscation of such liquors, according to the provisions of this act."

I do not now intend to consider the abstract question, how far

such a proceeding as is thus directed can, under any circumstances, and when surrounded by every practicable safeguard, be upheld; but I propose to inquire how far the particular provisions of this act are consistent with established and fundamental principles of justice, and with some of the express provisions of the Declaration of Rights, and the Constitution of this Commonwealth.

Section thirteen, as we have seen, authorizes the officers named, without a warrant, "to arrest any person whom they may find in the act of illegally selling, transporting, or distributing intoxicating liquors, and seize the liquors," &c. To understand fully the extent of the extraordinary power which is here conferred, it is necessary to refer to section twenty, which defines what shall be an illegal transportation of intoxicating liquors. It is as follows: (section twenty,) "Every person who shall bring into this state, or who shall convey from place to place, within the same, any spirituous or intoxicating liquor, with the intent to sell the same himself, or to have the same sold by another, *or having reasonable cause to believe that the same is intended to be sold by any other person*, in violation of this act, shall be punished," &c.

The effect, then, of these provisions, taken together, is, not only to render the property of the individual liable to seizure, whenever, in the opinion of the officer, an illegal sale is being made, but also to confer upon this class of officers the dangerous prerogative of judging of *intent* and *reasonable grounds* of belief. It thus exposes this property to the risk of seizure and detention, whenever, in the irresponsible opinion of some officer, the person conveying it intends to sell it himself, or has merely reasonable grounds to believe that some one else intends it for sale.

Article fourteen of Bill of Rights provides, that "every subject has a right to be secure from all unreasonable seizures of his person and all his possessions;" and by article twelve, "no subject shall be despoiled or deprived of his property, but by the judgment of his peers or the law of the land." These expressions have been understood, from Magna Charta to the present time, to mean a trial by jury, in a regular course of legal and judicial proceedings.

Fisher *v.* McGirr et al, 1 Gray, 37; 1 Curtis 311.

Now, as the seizure of property directed by sections thirteen and thirty-one deprives the citizen of his property, without any warrant or process of law whatever, without any preliminary accusation, or any trial by jury or otherwise; the only ground upon which it can be maintained, if maintainable at all, is, that it is itself merely a preliminary step to a regular course of legal and judicial proceedings, for which full provision is made in the act, and by which due legal process and a trial by jury, with all necessary safeguards, are secured to the owner, according to the requirements of the Constitution.

If these sections merely direct the seizure and detention of the

property by the officer, and no provision is made in them, or elsewhere in the act, for an ultimate trial as guaranteed by the Constitution, then these sections are directly repugnant to the Constitution, and are void.

These principles were most fully stated and applied in Fisher *v.* McGirr, 1 Gray, 1.

The question then is, does any such provision exist in this act? It is very certain that none is contained in the thirteenth section. After providing for the arrest and seizure, without a warrant, of the person and property of the supposed offender, it then directs the officer to "detain them in some place of safe keeping, until warrants can be procured on complaint made for the trial of said person or persons, and for the seizure of said liquor, &c., *under the provisions of this act.*" It points out itself no court or magistrate to whom complaint may be made, or who may issue a warrant for the seizure of the liquor, nor does it, in any particular, provide any course of proceedings by which a trial may be reached, and the question of the illegally selling or transporting the liquor be judicially determined. It leaves the property in the custody of the seizing officer, and makes no provisions for any subsequent proceedings, *unless* by the reference to the other provisions of the act. The same remarks are applicable to the thirty-first section.

We are then to inquire whether any provision is elsewhere made in this act, for the issuing of warrants for the seizure and confiscation of liquors, which have already been seized by an officer, and are in his custody, or in the custody of the court or magistrate, under sections thirteen and thirty-one, and whether any provision is made for a trial thereon.

It is hardly necessary to premise, that, as this act creates a novel course of proceedings wholly unknown to the common law, no court or magistrate has any jurisdiction or authority whatever in the premises, except so far as the act itself specifically confers it.

Now, the twenty-fifth section is *the only one in this act which contains any provision for the issuing of warrants for the seizure of intoxicating liquors.* No other section or clause of this act confers, or professes to confer, any authority upon any court or magistrate to issue a warrant of seizure, or upon any officer the power to serve the same. Furthermore, by the express terms of section twenty-six, it is only when liquor shall have been seized upon "such warrant," as section twenty-fifth prescribes, *that any trial as to the forfeiture of the liquor is provided for, or can take place.* No confiscation of any liquors can be ordered except such as may be seized under warrants issued under section twenty-fifth. Sections twenty-six, twenty-seven, twenty-eight, twenty-nine, and thirty, (which, with the twenty-fifth, comprise all the provisions in this act in reference to the seizure and forfeiture of liquors,) relate, exclusively, to the proceedings sub-

sequent to the return of the warrant upon which liquors may have been seized. To recur, then, to the twenty-fifth section, it describes, with particularity, in what cases, upon whose complaint, and by what authority, the warrant shall issue, as follows:

If any two persons, being of full age, and competent to testify, shall, before any justice of the peace, or judge of any police court, having jurisdiction to try criminal causes, make complaint, under oath or affirmation, that they have reason to believe and do believe, that any spirituous or intoxicating liquor, described in the complaint, is kept or deposited in any store, shop, &c., by any person named in said complaint, and intended for sale in this Commonwealth by such person, such person not being authorized to sell the same, or manufacture or to keep the same for sale in this Commonwealth, for any purpose under this act, or any other legal authority whatever, said justice or court, upon its appearing that there is probable cause to believe said complaint to be true, shall issue a *warrant of search* to any sheriff, &c., commanding such officer to *search the premises* in which it is alleged such liquor is deposited, and to seize such liquor, with the vessels in which it is contained, and to keep the same securely until final action be had thereon, and to return the warrant, with his doings thereon, as soon as may be, to the justice or court that issued the warrant, or to some other justice or police court having jurisdiction," &c. After providing for additional allegations, where the place to be searched is a dwelling-house, it requires that the complaint and warrant shall both particularly designate the place to be searched, the liquors to be seized, the person by whom owned or kept, and the officer to whom the warrant is committed shall, thereupon, *proceed to search* the premises described, &c.

Is it not perfectly obvious, that this section was framed for an entirely different purpose, and that it can have no possible application to proceedings under the thirteenth and thirty-first sections? Two or three considerations seem to be decisive.

1. In the first place, the only warrant which section twenty-five contemplates or provides for, is strictly *a search warrant.* It makes no provision for a warrant of seizure in distinction from a warrant of search. The direction to the court or magistrate, in the given case is, "to issue a warrant of search," commanding the officer "to search the premises;" both in the complaint and warrant, "the place to be searched" shall be particularly described; and, finally, the officer "to whom the warrant is committed, shall, thereupon, proceed to search the premises described."

The section pre-supposes throughout, that at the time the warrant issues, the liquor is not yet in the custody of the law, nor of any of its officers, but that it is *unlawfully kept* in the place described *for sale*, and the very purpose of the warrant is to search it out, and bring it within the custody of the law.

The gross impropriety and inconsistency of issuing a warrant of *search* for the very property which this section (thirteenth) contemplates, has already been seized by the officer, and is then "detained by him in some place of safe keeping," are almost too obvious to be stated. They become, if possible, even more glaring when we refer to section thirty-one, which requires the officer to take the liquors seized immediately before the court or magistrate. Having done that, he is then to make complaint for the seizure and confiscation of the liquor. Can it be possible that, with the liquors in the very presence and custody of the court, the worse than folly is to be perpetrated, of the officer swearing that they are elsewhere, namely, in some place *for* the unlawful *purpose of sale*, and that, thereupon, the court is to issue its warrant of search accordingly?

2. But, again. In what cases, and upon what allegations does the twenty-fifth section authorize the warrant to go? I answer, upon complaint under oath, only, that the complainants have reason to believe, and do believe, that the liquor described "is kept or deposited" in the place designated "*by the person named in said complaint*, and *intended* for sale in this Commonwealth by such person," and "upon its appearing to the court or magistrate that there is probable cause to believe said complaint to be true."

Can any such complaint be made under the thirteenth and thirty-first sections; or, if it were made, could any court or magistrate have probable cause to believe it to be true? Under those sections, the liquor which was unlawfully kept, has been taken from the owner or possessor, and is already in the keeping of the officer or of the court. That warrant, then, which can only issue upon complaint under oath, that the liquor is then unlawfully kept for the purpose of sale, and which directs a *search* for the liquors, is not the warrant which can issue for any seizure under sections thirteen or thirty-one.

3. Again: the *only* case where a warrant can issue under section twenty-five, is where the liquor, kept or deposited by the person named, *is intended for sale by him in this Commonwealth.* Both the complaint and warrant must allege his intent to sell in this Commonwealth. But section thirteen authorizes the seizure of liquor, by the officer, although the person in whose custody it is, has no intention whatever of selling it;—for, it provides that the officer may seize not only when he finds any person illegally selling, but also *transporting* intoxicating liquors. Now, as we have seen by reference to section twenty, illegally transporting is conveying within the state, not only when the person has the intent of selling himself, but also when he has no such intention, but only has reasonable cause to believe that it is intended to be sold by others.

But what section or clause of this act authorizes any court or magistrate to issue any warrant of search or of seizure, upon the

complaint or allegation that the party conveying the property has no intent to sell himself, but only reasonable cause to believe that it is intended for sale by some other person; or what section or what clause authorizes any warrant of search or seizure, or any trial, or confiscation, in any other case, or upon any other complaint, than where it is distinctly alleged, that the liquor is intended for sale by the person in whose custody it is? Clearly there is none; and this, of itself, constitutes a fatal difficulty in the application of the provisions of the twenty-fifth section to section thirteen.

4. The same objection in substance, and with equal force, applies to section thirty-one. That directs the seizure of liquors, whenever found in the places designated, *although not kept or designed for sale.* It directs the officer to make the seizure, "if he shall have information that any intoxicating liquors are *kept*, or sold in any tent, &c." Thus, the mere *keeping* of liquor in these places, without any intent to sell, is made an offence by this section, and the officer is directed to seize it, although the liquor is not intended for sale, and although no liquor may have been sold therein.

It is sufficient to inquire where in this statute is authority conferred upon any court or magistrate, to receive a complaint or issue a warrant for the seizure and confiscation of property, unless some one has the intention of selling it contrary to law? It would seem that section twenty-five was quite specific enough upon this point, for it repeatedly and carefully declares that both the complaint and warrant "shall allege the intent to sell in this Commonwealth contrary to the provisions of this act."

5. Finally, on this topic, the warrant for which section twenty-five provides, can only issue upon the complaint "of two persons, of full age, and competent to testify."

Unless two persons of this description voluntarily concur in making the complaint, no warrant can, by any possibility, issue; and of course there can be no trial and no adjudication. Wherever, then, a seizure is made, either under section thirteen or thirty-one, the owner's right to a trial is postponed until two persons voluntarily concur in making the complaint which section twenty-five requires as preliminary to any judicial proceedings. But that may never be, and thus the owner may practically be forever deprived of his property. It may be said that the statute intends that the officer who makes the seizure shall also make the complaint—but that does not remove the difficulty. For even if the statute did impose this duty upon the officer, he might not perform it, and it is not competent to make any man's right to a trial depend upon such a contingency. But the decisive answer is, that the officer, however willing, cannot make the complaint alone. The difficulty is thus just as great as before, for no one may concur with him in making it. The act makes no certain provision for the case. The objection, then, to the act,

under this view of the case, is this: It, in the first place, subjects the property of the citizen to seizure, without any warrant or process of law, and then makes his right to a trial to depend on the contingency of two persons uniting in making such a complaint as section twenty-five requires. For, unless such a complaint is made, there can be no warrant of search, no trial, and no adjudication.

The provisions of the twenty-fifth section are so totally inapplicable to any proceedings, under the thirteenth and thirty-first sections, that it is hardly respectful to the Legislature to suppose that it intended a reference to those provisions, when, in sections thirteen and thirty-one, it speaks of warrants to be obtained "under the provisions of this act," but rather, that it referred to some appropriate provisions which may have been in the contemplation of the framers of these sections at the time, but which, by some accident, failed to be inserted in the act.

The conclusions, then, to which I have arrived upon this branch of the statute, may be thus stated:—

1. That sections twenty-five to thirty contain the only provisions in this act for the issuing of warrants of search and seizure of liquors, or for trials consequent thereon.

2. That for the reasons specifically enumerated, those provisions cannot embrace any case arising under sections thirteen or thirty-one.

3. That, therefore, the thirteenth and thirty-first sections direct the seizure and detention of property without making any provision for "a trial by jury, in a regular course of legal and judicial proceedings."

For these reasons, I am of the opinion that sections thirteen and thirty-one are plainly repugnant to those provisions of the Declaration of Rights which secure the citizen from unreasonable seizures of his person and property, and from being deprived of his possessions, without the judgment of his peers, or the law of the land, and are therefore void.

II. I proceed, in the next place, to consider those provisions of the act which relate to the seizure of spirituous liquors upon legal process, and which, with all the proceedings consequent thereon, are comprised in sections twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, and thirty. The purpose of this system of measures, in connexion with section twenty-four, is obviously the same as that of the act of 1852, chapter 322, namely, to prevent the keeping of intoxicating liquors in any place by any person for the purpose or with the intent that they shall be sold contrary to the provisions of the act.

This, like the act of 1852, it attempts to accomplish by two modes of proceeding; the one a proceeding *in rem*, the other a proceeding *in personam*. The general scope and purpose of the two acts in these particulars are the same: the only difference being that the latter act does not blend the two modes in one

process, but contemplates a separate course of proceeding for each—attempts to reform some of the defects in the previous act, and prescribes a severer punishment.

There can be no question that the proceeding directed by this act, for the seizure and forfeiture of the property, is a *criminal prosecution*, and is to be viewed accordingly.

The act itself early declares, (section three,) that it "shall be unlawful and *criminal* to own, &c., intoxicating liquor with intent to sell the same;" and the confiscation of the property is subsequently prescribed as one of the penalties for the punishment of this crime. The whole course of proceeding is peculiar to the criminal law, by complaint under oath and warrant of search; section twenty-seven in one instance provides "the cost of the proceeding shall be paid as *in other* criminal cases;" and by section twenty-nine the party is required on an appeal to recognize "to abide *the sentence* of the court thereon."

The Court, (in Fisher *vs.* McGirr *et al.*, 1 Gray, 1,) in treating of the proceedings *in rem* under the act of 1852, in distinction from the proceeding *in personam* pronounce it to be *a criminal proceeding;* and indeed the greater part of that most able and elaborate opinion is devoted to a consideration of how far, as such, it was in conformity with established principles of criminal jurisprudence, and the provisions of the Constitution. Speaking of both proceedings, the court say, (page 27,) "Both are proceedings designed for the enforcement of the criminal law, *and must be governed by the rules* applicable to its administration. (See also page 37.) And again, (on page 42,) they affirm that the provisions of articles XII and XIV, Declaration of Rights, *are common to both modes of prosecution.*"

The same views are expressed by Mr. Justice Curtis, in the *case of Green* vs. *Briggs et al.*, 1 *Curtis*, 311. "These proceedings are clearly criminal in their nature," page 328. And again, (page 331,) "if *this were simply a proceeding* to forfeit property, it would, nevertheless, be a criminal prosecution within the meaning of this clause of the Constitution, and the owner would be entitled to a trial by jury, and to have the accusation," &c.

In stating then the principles applicable to a prosecution of his character, I cannot do better than adopt the language of the Supreme Court in the case already referred to, (1 Gray, 35.) "Such being the character of the prosecution, in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards *necessary to the security of the innocent*, having the full benefit of the maxim that every person shall be presumed innocent, until his guilt be established by proof."

Let us then inquire how far the proceedings, directed by this act, conform to the well established principles of criminal jurisprudence, and the provisions of the Constitution.

Section twenty-five having provided for the issuing of the

warrant of search and seizure, section twenty-six invests the justice of the peace, or the police court before which the warrant is returned, with jurisdiction to hear and determine the case on the merits, if, in the opinion of the justice or court the value of the liquor seized, with the vessels containing it, does not exceed twenty dollars. If, in their opinion, it does exceed that sum, then, by section thirty, the notice is to be made returnable to the Court of Common Pleas, or Municipal Court.

There is no trial by jury before the justice or police court. The provision for an appeal is as follows, (section twenty-nine:) "Any person claiming any *spirituous* liquors, whose claims shall not be allowed under the provisions of the twenty-seventh section of this act, or any person complained against, shall have the same right of appeal, and to the same court, as if he had been convicted of a crime; *but before his appeal shall be allowed*, he shall recognize to the Commonwealth in the sum of two hundred dollars, with a good and sufficient surety or sureties, to prosecute his appeal at the court appealed to, and to abide the sentence of the court thereon."

Without pausing now to consider what other defects may exist in these proceedings, I propose, briefly, to inquire how far they secure or deny to the person whose property is seized, the right to a trial by jury.

1. In the first place, although intoxicating liquors, in distinction from those which are spirituous, are liable to seizure, as well as spirituous liquors, yet all right of appeal is denied to the owner of such intoxicating liquors, unless he happens to be named in the complaint. The right of appeal in such a case is confined to the claimant of *spirituous liquors*, (section twenty-nine.) In all cases, therefore, of the seizure of *intoxicating liquors which are not also spirituous*, no appeal is given, and the decision of the justice or police court is final. This is in direct conflict with the constitutional provision which guarantees a trial by jury. If it were possible, by the rules of law, to read this section so that it should embrace not only spirituous liquors, but all those various liquors not spirituous, which, by section first, are declared to be intoxicating, it would undoubtedly be the duty of courts to give it that construction.

But I know of no principle or rule of law which would authorize such a substitution for the provision which the Legislature have plainly made. The distinction between spirituous liquors and those not spirituous, is recognized and preserved in this act throughout. Section first is, of itself, decisive of the meaning in which the terms are employed, for it makes "intoxicating," the generic term, to include not only *spirituous* liquors, but ale, beer, wine, &c., as enumerated.

2. But I proceed to consider the graver and more general objection which arises from the condition which is annexed to the right of appeal in every case, viz: "*but before his appeal shall*

be allowed, he shall recognize to the Commonwealth, in the sum of two hundred dollars, with a good and sufficient surety, or sureties, to prosecute his appeal, and to abide the sentence of the court thereon."

Unless, then, the party can furnish to the Commonwealth a recognizance, with good and sufficient surety, or sureties, in the sum of two hundred dollars, to prosecute his appeal, and abide the sentence of the court thereon, he *can have no trial by jury* in any case where the justice or police court have seen fit to take jurisdiction. I cannot avoid the conviction, that these proceedings are unconstitutional in this; that they deny to the citizen, in a criminal prosecution, the right to a trial by jury, unless he can, and does, comply with a novel and onerous condition, which is not within the power of the Legislature to impose. I do not intend to be understood as calling in question the competency of the Legislature to confer on justices of the peace, or police courts, jurisdiction in this or any other criminal case. But it must be so done as to preserve unimpaired, the right of trial by jury, otherwise, the whole proceeding is void, *ab initio*. If the law conferring this jurisdiction denies to the accused a trial by jury, unless he complies with a condition to which he is not bound to submit, it is in conflict with the Constitution, and is inoperative. (1 Curtis 333.)

Now this law requires of the accused *as a condition to his right of trial by jury*, that he should furnish surety, or sureties, satisfactory to the court, or magistrate, that he will prosecute his appeal, and abide the sentence thereon. This, and without any fault of his, he may be unable to do. He may be poor, friendless, or a stranger. If for these, or any reason he is unable to furnish the required security, then this law denies to him that which the Constitution guarantees to every one accused of a crime—the absolute right to a trial by jury. I most respectfully submit, that this is a condition which the Legislature has no right to impose. It clogs, by unusual restraints and incumbrances—in many cases it will entirely defeat—the right to a trial by jury. A trial before the magistrate, or inferior court, does not satisfy the Constitution. In every such case, the appeal annuls the sentence of the inferior tribunal—the accused is still presumed innocent, and is still entitled to a trial in the constitutional mode. The odious feature, then, of this condition, is, that by denying the right of appeal, it treats the innocent, who are unable to furnish the required security, as if they were guilty, and punishes them, while still presumed innocent, for their poverty or want of friends. (1 Curtis 325.)

So far as I have been able to ascertain, this attempt to impair the constitutional right to a trial by jury, stands without precedent in our criminal jurisprudence, with the solitary exception of the act of Rhode Island, 1852. That law was declared, in

Greene v. Briggs, *et al.* 1 Curtis 311,

to be unconstitutional, and the Legislature of that state, at their next session, hastened to repair the defect in this particular.

See act of January, 1853.

I am fully aware, that in the case referred to (1 Curtis,) the party was required to furnish sureties, not only to prosecute his appeal, but to pay such fine and costs as might be imposed. But the opinion of the court did not turn on any such distinction, and the principle which was so ably stated and applied in that case, is as fatal to one onerous condition as to several. Indeed, the court says, (page 327,) "if *one onerous* condition may be imposed, so may any number, until the right becomes so difficult of attainment that it ceases to be a common right, and can be enjoyed only by a few."

It is undoubtedly competent for the Legislature to require, as a proper means of securing the personal attendance of the accused, that unless he enters into recognizance with sureties, to prosecute his appeal and abide the sentence thereon, he shall be committed; and so are the general provisions of the Revised Statutes, chapter 138, section 1; so, even, was the act of 1852, chapter 322, section 16. But it is a very different thing to require, as this act does, as a *condition to the* right of appeal, and of a trial by jury, that the accused shall be able to furnish such sureties.

3. The objection which has thus been considered, if a sound one, (as I can not doubt it is,) is fatal to any proceedings under the seizure clauses of this act.

It is very true that, by section thirty, if, in the opinion of the justice, or court, the value of the liquor seized exceeds the sum of twenty dollars, the notice is to be returnable to the Court of Common Pleas, and the trial is to take place there. But it is equally true, that by section twenty-six, unless, in the opinion of the court or justice, the value of the property does exceed that sum, they are authorized to take jurisdiction. The act thus makes their opinion, on the question of value, conclusive. I say conclusive, because if they assume jurisdiction no other tribunal can be reached, except through an appeal, and because no other court has any authority or jurisdiction, appellate or otherwise, to *reconsider their adjudication as to the value of the property.* The result, therefore, is, that they *may* assume jurisdiction in every case. The act furnishes no security to the contrary, it makes no provision for any hearing or proof as to the value of the property, and affords no opportunity to the owner to instruct or gainsay the opinion of the court thereon.

The fatal difficulty, therefore, is, that the inferior court may assume jurisdiction in every case. Whether they will or not, can not be known until the citizen's property has been seized, and brought before them. But the constitutionality of this law can not vary with, or be made to depend upon, the action of the court in each particular case, after the liquor is brought before

it; for we then should have the absurdity of a law, constitutional in one case, and not in another. The character of the law is fixed before any action under it; the seizure is lawful, or unlawful, when it is made. The only question, therefore, is, what absolute security for a trial by jury does this act furnish? No one can deny that, under this act, the inferior court may, if it see fit, proceed to try and confiscate, in every case that may arise. The only mode, then, certainly provided, by which the accused can reach a trial by jury, is through the appeal, and that, as we have already seen, is loaded with oppressive and unconstitutional conditions.

III. Passing from these objections, there is an omission in the act, affecting its operation in the County of Suffolk, to which it is proper I should advert.

The thirtieth section, after providing that the notice shall be returnable "to the term of the Court of Common Pleas having jurisdiction in criminal cases, or of the Municipal Court," when, "in the opinion of the justice," &c., the value of the liquor exceeds twenty dollars, proceeds thus: "And *the Court of Common Pleas, before which such notice is made returnable*, shall have jurisdiction of the case, and may issue new notices, in the manner directed in said section, if necessary, and shall proceed to try the case, in the manner directed in said twenty-sixth section, as nearly as may be, and with a jury," &c.

The remarkable feature of this section is, that the clause which confers the jurisdiction, and directs the mode of trial, is confined entirely "*to the Court of Common Pleas before which such notice is made returnable*," *and excludes the Municipal Court.* "The Court of Common Pleas, before which such notice is made returnable," is, as the section itself directs, "the term of the Court of Common Pleas, in the same county, having jurisdiction of criminal cases."

Now, as is well known, the Court of Common Pleas in the County of Suffolk has no jurisdiction of criminal cases, but the same is confined to the Municipal Court. Unless, therefore, the description "the Court of Common Pleas, before which such notice is made returnable," can be properly held to embrace the Municipal Court also, it follows this section confers no jurisdiction upon any court of any cases arising under the thirtieth section, in the County of Suffolk. Can, then, this clause be held to embrace the Municipal Court?

It is highly probable that the Legislature intended to make provision for the County of Suffolk, and that the omission, if there be one, was the result of oversight. But the question still recurs, what have they done, and how far to this presumed intention have they given effect? For, "although it is a fundamental rule, that every law must be construed according to the intention of the makers, still this intention is never resorted to for any further purpose, than to ascertain what they, in fact,

intended *to do*, and not for the purpose of ascertaining *what they have done.*"

Leavitt *v.* Blatchford, 5 Barb., Sp. C. N. R. 13.

The question here is, *what has the Legislature done?* The principles applicable to the construction of penal statutes are familiar and well settled. The general rule universally recognized is, that they are to be construed strictly. They are never extended by implication.

Andrews *v.* U. S., 2 Story 213.

It is not the province of courts to supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments.

Swift *v.* Luce, 27 Maine 286.

The power of extending the meaning of a statute beyond its words, and deciding by the equity and not the language, approaches so near the power of legislation, that a wise judiciary will exercise it with reluctance, and *never in the case of penal statutes*, or *mere arbitrary regulations of matters of public policy.*

Monson *v.* Chester, 22 Pick. 387.

And although the omission or defect may result in a failure of justice, this furnishes no sufficient ground for construing the statute, against its clear meaning, so as to give a court jurisdiction.

Pitman *v.* Flint, 10 Pick. 506.

To apply, then, these principles to this question: the thirtieth section, after providing for the return of the notice "to the term of the Court of Common Pleas, having jurisdiction of criminal cases, or of the Municipal Court," proceeds thus: "*And the Court of Common Pleas before which such notice is made returnable* shall have jurisdiction of the case," &c.

Here, clearly, is no mention, in terms, of the Municipal Court; on the contrary, the terms exclude it. The act, in the very preceding sentence, recognizes the existence of a Municipal Court as well as a Court of Common Pleas, and mentions both; in this, it singles out and confers jurisdiction upon one. Upon what principle, then, can it be maintained that the Municipal Court has jurisdiction? The description "the Court of Common Pleas," &c., does not describe, and cannot embrace the Municipal Court of the city of Boston. I do not overlook the fact, that, by the act of 1843, ch. 7, the duties of the Judge of the Municipal Court were transferred to the Justices of the Court of Common Pleas. But so far from any thing in that act impairing the view presented, it, on the contrary, very much strengthens it. For, by the third section it is expressly provided that "*the name, style, and caption of the said* Municipal Court, and its powers, duties, and jurisdiction shall continue the same as now prescribed by law;" and by section fifth, that all proceedings therein, &c., shall be heard, &c., by one of said justices of the Court of Common Pleas, "*sitting as aforesaid as Judge of said Municipal Court.*"

We thus have an express legislative enactment, that the name of this court shall continue to be the Municipal Court of the city of Boston. It can, therefore, be known to the law by no other name. Can it then be seriously pretended that any legislation which employs the phrase "the Court of Commom Pleas," or "the term of the Court of Common Pleas, having jurisdiction in criminal cases," describes, or is applicable to, the Municipal Court? If any thing could add force to the express enactment in reference to its name, it would be the course of legislation ever since, from which it will appear that the Legislature have uniformly recognized the Municipal Court as distinct from the Court of Common Pleas, and have deemed it necessary to name it specifically, whenever it was intended to be embraced. The act of 1844, ch. 44, is, among many others, a prominent instance. Section first provides that actions on certain recognizances may be brought in the Municipal Court, and proceeds, "and said Municipal Court shall have jurisdiction thereof, concurrent with the Court of Common Pleas and Supreme Judicial Court in said county, in all cases wherein said Court of Common Pleas and Supreme Judical Court respectively now have jurisdiction."

But we need not go beyond the act, nor the very section under discussion, for illustrations. In the very provision for the return of the notice it recognizes the distinction between the courts, and the necessity of specifically naming the Municipal Court, if it is intended to be included. However probable, therefore, the presumption may be that the Legislature intended to make some provision for the case, however entire the failure of justice which may result from the omission, to extend this clause of the act to the Municipal Court, where, by its express terms, it is limited to the Court of Common Pleas, would, as it seems to me, be a violation of some of the plainest and most important rules of law. It would be to legislate, and not to construe. Such oversights must be corrected, if at all, by the body who makes them, and not by the courts. (5 Cush. R. 373.)

It is very clear that the mere direction for the return of the notice constitutes no adequate provision for the case. The notice issues from the magistrate or police court, and is merely directory to the party to appear for trial, &c.

Suppose the party appears, how is the court to proceed? What is it to try, and in what mode, by jury, or otherwise, and what is to be the judgment, and how enforced? For none of these essential particulars does the notice provide. This whole proceeding is entirely the creature of the statute. No court has any jurisdiction in the premises, except what the statute confers, and then only to the extent and in the mode which it prescribes. This section, acting upon that necessity, proceeds to confer jurisdiction upon the Court of Common Pleas, and to prescribe the mode of trial and the subsequent proceedings. Moreover, a decisive answer to any suggestion drawn from the circumstance that

notices are made returnable to the Municipal Court, as well as to the Court of Common Pleas, is, that the statute does not stop there, it leaves nothing to inference, but *proceeds to define*, by an express provision, what court shall have jurisdiction, and the manner in which it shall be exercised. That court is the Court of Common Pleas having criminal jurisdiction, and not the Municipal Court.

IV. The twentieth section of this act, provides that "every person who shall bring into this state, or who shall convey from place to place within the same, any spirituous or intoxicating liquor, with intent to sell the same himself, or to have the same sold by another, or having reasonable cause to believe that the same is intended to be sold by any other person, in violation of this act shall be punished, &c."

The right of the state to regulate the domestic traffic, in this or any other article of property, is clear.

I propose to examine that portion of the section which assumes to prohibit and punish the importation of liquors into the state—"Every person who shall bring into this state."

The Constitution of the United States, art. 1, section eight, declares that "Congress shall have power to regulate commerce with foreign nations, and among the several states." This act makes it a penal offence to import spirituous or intoxicating liquors into this state, whether the importer intends it for sale himself, or to have it sold by another, or has only reasonable cause to believe that it is intended for sale by others. The language is broad enough to include importations from foreign countries under the laws of Congress, and unless it is limited, by sections two and four, to importations from other states of the Union, the act is clearly unconstitutional, as a regulation of commerce with foreign nations.

Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 Wheat. 419; License Cases, 5 How 504.

But confining the language to importations from other states, is it not equally repugnant to the Constitution as a regulation of commerce among the several states? "*Among* the several states" means between two only, as well as among more than two.

5 How. U. S. 599.

It is very clear, that laws regulating the importations of a state or country, are regulations of commerce, and have always been regarded as the exercise, in one of its most important branches, of the power to regulate commerce. (Cases *supra.*)

This law, therefore, forbidding the importation of liquors into this state, is clearly a regulation of commerce, unless it stands upon some peculiar exception which exempts it from the application of the well settled general rule. Now, it is settled beyond controversy, that spirituous liquors are property and articles of commerce.

5 How. U. S. pp. 577, 599; 1 Curtis 328; 1 Gray 33.

This very act so recognizes them, and provides, in some measure, for their manufacture and sale. A state may, undoubtedly, pass laws regulating the domestic traffic within its own borders. It has full power in all matters relating to its internal police; it may pass quarantine and health laws; it may exclude paupers and convicts from its territory; it may order the destruction of cargoes imported under the laws of Congress, which have become decayed or infectious, and the landing of which would be perilous to the lives or health of its citizens.

The ground upon which these, and similar laws, have been upheld is, that they either concern, exclusively, the internal police of the state, or that they deal with matters which never were, or have, confessedly ceased to be subjects of commerce. But it is not competent for a state, acting upon any peculiar policy of its own, or in the alleged exercise of its power, to pass laws for the preservation of the health or morals of community, to declare what may or may not be articles of commerce. If this be so, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce.

5 How. U. S. 600.

If, in the exercise of any such power, it may declare, that spirituous liquors are a nuisance, on the ground that they are detrimental to the health or morals of its citizens, so it may in regard to any other article of known commerce; so, also, may it prohibit the importation of those articles from abroad, as well as from other states of the Union; because the ground upon which this power to exclude must rest, if it rest at all, is not that a state may regulate commerce, as between the states, any more than with foreign countries; but, because, notwithstanding the constitutional provision, it is competent for the state to exclude from its territory whatever it may deem injurious, or the introduction of which may conflict with its peculiar policy.

It, therefore, becomes immaterial whether the article is of foreign importation or not. In this mode, that provision of the Constitution which confers upon Congress the power to regulate commerce, is made subordinate to the police power of every state, or to its local policy, in declaring what shall or shall not be articles of commerce. One state may declare that the introduction of the cotton of the South, another of the manufactures of the North, is contrary to its policy, and injurious to its interests.

Groves *v.* Slaughter, 15 Peters 507.

The observations of Ch. J. Taney are conclusive upon this point—

"It has indeed been suggested, that if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to

introduce vice, immorality, and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a state may do this upon the same principle that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism, are not subjects of commerce, although sometimes among its attendant evils. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists.

License Cases, 5 How. 576, 577.

And Mr. J. McLean, in delivering his opinion in the case of Peirce *v.* New Hampshire, which was the case of the sale of a cask of gin imported from this state into N. H., expressly states, p. 595, " If this tax (requiring a license to sell) had been laid on the property as an import into the state, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the states which has been exclusively given to Congress."

The conclusion, therefore, seems unavoidable, that this law which prohibits altogether, and under a penalty, the importation of spiritous liquors from other states for the purpose of sale, is an attempt to regulate commerce among the several states.

It was early settled in the Supreme Court of the United States, in the case of Gibbons *v.* Ogden, 9 Wheat. 198, that the power vested in Congress by the Constitution to regulate commerce is an exclusive power and cannot be exercised by the states. That case has been repeatedly re-affirmed since: and though some diversity of opinion has existed among its members, it remains the settled opinion of that Court.

Brown *v.* Maryland, 12 Wheat. 445, 446; New York *v.* Miln, 11 Peters 158; Groves *v* Slaughter, 15 Peters 504, 511; Passenger Cases, 7 Howard, U. S. 393 to 400 and 411.

If the views thus stated are correct, then these conclusions follow:—

1. That the importation into this state from another state, of spirituous liquor, and its transportation to its immediate place of destination within this state are lawful; and that this act so far as it prohibits the same, is repugnant to that provision in the Constitution which vests in Congress the exclusive power " to regulate commerce among the several states," and is void.

2. The conveyance of liquors from place to place, within the state, for the purpose of sale, the Legislature may regulate.

3. But this qualification does not extend to a delivery *to the purchaser*, of foreign imported liquors, sold according to law.

It is lawful to sell and lawful to purchase imported liquors, in the original packages of the importer.

5 How. and 12 Wheat. *supra*—also sec. 2

Delivery is incident to a sale. A conveyance, therefore, from the place of sale within the state, to the place of delivery, of imported liquors thus sold, is lawful, whatever the purchaser's intentions in regard to it may be.

V. I proceed to examine, briefly, the following provision of sec. thirty-four. "In all cases under this act, delivery of intoxicating liquor *in* or from any building or place, other than a private dwelling house or its dependencies, or in such dwelling house or dependencies, if any part of the same be a tavern, public eating-house, grocery, or other place of common resort, shall be deemed *prima facie* evidence of a sale, *and be punishable as such sale.*"

If we are to adhere to the language of this section, then every delivery hereafter of intoxicating liquor, (unless made in or from a dwelling-house or its dependencies,) no matter how innocent the intent, how laudable the purpose, or how supreme the exigency, is to be followed by the ignominious punishment of fine and imprisonment. Is it possible to escape this conclusion?

A forced and artificial construction is never to be applied to any law, for the purpose of fastening upon it objections to which it is not justly obnoxious. It is to be read fairly, always; and, if possible, so as to be held consistent with the rules of law and plain principles of justice.

But does the language of this section leave room for two constructions? One would at first naturally suppose that by employing the phrase "shall be deemed *prima facie* evidence of a sale," the Legislature did not intend to attach absolutely, to a mere delivery, the consequences of an illegal sale, if the accused could prove that the transaction in fact did not amount to one. Such clearly would have been the result, were it not for the additional clause making a mere delivery absolutely punishable as a sale.

It is quite evident that the term "*prima facie* evidence" is employed in this section without much regard to what has heretofore been supposed to be its true meaning. The succeeding clause of the section in reference to a delivery from a dwelling-house illustrates this, where all the elements of a sale are distinctly set forth; a delivery of property, with payment, or promise of payment, express or implied. It is a novel application of terms to call that *prima facie* evidence of a sale, which the statute makes equivalent to conclusive evidence of it.

The statute of 1852, chapter 322, section 11, provided that delivery in or from certain places should be deemed *prima facie* evidence of a sale, but to that provision this act has added *that it shall be punishable as a sale.* It must, therefore, be presumed that the alteration was designed, and made for a purpose.

Thus, then, the mere delivery by any person under any circumstances, of intoxicating liquors, in any other place than a dwelling-house, and even there, if part of it be a tavern, &c., is made a crime, punishable by fine and imprisonment. Such a law I believe to be tyrannical, unjust, and an unwarrantable interference with

the right of the citizen to the enjoyment of his property, as guaranteed to him by the Constitution. (Articles I and X.) It is, apparently without motive, as well as without precedent or parallel, unless it be to expose innocent persons to vexatious and oppressive prosecutions.

The ostensible purpose of this act is to prevent the *unlawful sale* of spirituous liquors, and therefore most of its provisions are directed against the unlawful sale or the unlawful intent to sell.

But it distinctly recognizes throughout, what its denial could not alter, that spirituous liquor *is property;* nay, that it is a *necessary and indispensable article* of property, and one, in the traffic in which it is not beneath the dignity of the towns and cities of the Commonwealth to engage. The incidents of property, therefore attach to it—the right to its use and enjoyment. But this act prescribes an arbitrary and wanton limitation to that right, which virtually amounts to a denial of it. Indeed, it is difficult to conceive of many instances, where the lawful and proper use of this article may not require the simple delivery of it from one person to another, which this law punishes as a crime. It is without any qualification as to occasion, circumstance, or person. It prohibits even any subsequent delivery of the very liquor purchased of an agent, under the authority of this act, although such delivery may be necessary to the lawful use for which it was purchased, and as it may be to the fulfilment of an imperative moral obligation. It confounds the innocent with the guilty; it violates the spirit, if not the letter, of that provision of the Declaration of Rights, which declares that every subject shall have the right to produce all proofs that may be favorable to him, and to be fully heard in his defence; it may proscribe the charity which would furnish relief to the sick, and beyond peradventure, and without escape, the administration of a Holy Sacrament is brought under the ban of its blind and indiscriminate condemnation. The Constitution has set some limits to the power of the Legislature. It ordains, chapter 1, section 1, art. IV, that the Legislature "shall have full power and authority to make, ordain, and establish all manner of wholesome and reasonable laws, so as the same be not repugnant or contrary to this Constitution." I can not but believe, for the reasons I have endeavored to state, that this law transcends the legitimate powers of the Legislature, and is repugnant to the Constitution.

In Preston *v.* Drew, 33 Maine 558, the court did not hesitate to hold that a law which recognized spirituous liquor as property, and yet denied the owner any remedy for the defence of his title or possession, was clearly unconstitutional. This law, if possible, does worse. It also recognizes spirituous liquor as property, and yet visits the owner with infamous punishment for what may be its proper and necessary use.

VI. It only remains to make one or two observations on the clause in section thirty-seven, that "all intoxicating liquors kept

for sale, and the implements, &c., contrary to the provisions of this act, are hereby declared to be common nuisances, and are to be regarded and treated as such."

I am of the opinion that this section cannot authorize the seizure and destruction of intoxicating liquors, in any other mode than that which is previously provided for in the act, and was not intended so to do.

Although it is said that a common nuisance may be abated by private force, yet this proposition is subject to many qualifications. Perhaps the best illustration of the true extent and application of the rule, is the case most often cited, of an obstruction to a highway by a fence or otherwise. There are many things declared to be nuisances which can only be reached by process of law. The carrying on of some trades may be a nuisance, and yet no one has a right to tear down the buildings in which they are carried on.

Rex. *v.* Pappineau, 2 Strange 688; Cooper *v.* Marshall, 1 Borrows 267.

A distinction has been thus stated: "Public nuisances are of two classes, namely: physical, tangible objects, for example, a fence on a high way—and those which being merely moral are intangible, for example, the assembling and misconduct of persons at a disorderly house, the keeping of a tippling shop, &c. Private persons may abate the former on their own authority; the latter can be suppressed only by legal proceedings.

7 Bacon's Abridg. Nuisance, C. Note; Gray *v.* Ayres, 7 Dana R. 375.

The rule thus stated is entirely decisive of itself, of this case, where the property is declared a nuisance, not necessarily from any unlawful use to which it is actually put, as in the case of keeping a tippling shop, but merely from the *intent* to put it to an unlawful use. But the objection does not rest there.

What does this act declare to be a common nuisance? Not simply intoxicating liquors. These, as we have seen, it fully recognizes throughout, as lawful subjects of property. If they become nuisances at all, it is by reason, not of any physical defect, but of the unlawful intent with which they are kept. "The illegality consists in the intent of selling; the intent qualifies the act of keeping, and impresses on the property illegally kept, the character of a nuisance."

1 Gray page 36.

But how is that criminal intent to be ascertained? Without trial, and on the mere judgment of any one who may choose to proceed to the destruction of his neighbor's property? Clearly not. The indispensible fact in order to render the keeping illegal, and the property a nuisance, being the intent to sell contrary to law, the owner is entitled to have that offence first proved and established by legal evidence, and in a judicial trial. "Such a trial," says Shaw, Ch. J., (1 Gray 37) "alone can satisfy the express provision in the Declaration of Rights, Art. XII, which declares,

that no subject shall be arrested or deprived of his property, immunities, or privileges, or of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

I do not think this section intends the contrary; and all the preceding sections of this act furnish the same inference. They are devoted to providing a system of measures and proceedings for the seizure, trial, and confiscation of liquors unlawfully kept for sale. They specify, with particularity, in what cases they may be seized with a warrant, and in what cases without one, and they particularly designate the officers, who, in such cases, may seize without a warrant. Moreover, the succeeding section, (thirty-eight,) which may be called the indemnity clause in the act, confines its provisions against liability for actions brought to recover the value of liquors seized, &c., which have been unlawfully kept, *to those officers exclusively*, whose duty, by the preceding sections, it has been made to seize such liquors. These, certainly, are all most inconsistent and unnecessary provisions, if, by the thirty-seventh section, it was intended to devote this species of property, without any lawful process or trial whatever, to indiscriminate and irresponsible violence.

ELIAS MERWIN.

Boston, May 24, 1855.

The undersigned have severally examined the Act "concerning the Manufacture and Sale of Spirituous and Intoxicating Liquors," and particularly the clauses which form the subject of the foregoing opinion of Mr. Merwin, and unanimously concur in the results arrived at by him, and in the reasonings and principles by which those results are supported.

CHARLES G. LORING.
S. BARTLETT.
RUFUS CHOATE.

June 7, 1855.

LETTER OF

HARRISON GRAY OTIS, ESQ.,

ON SUMPTUARY LAWS.

Boston, Sunday, August 5, 1855.

To the Editor of the Boston Courier:

Dear Sir: A correspondent of yours, in your paper of Saturday, refers to a letter written by the late Hon. Harrison Gray Otis, on the subject of the policy of attempting to make men temperate by enacting stringent penal laws. As I happen to have a copy of that letter at hand—and as we may always recur with pleasure and with safety to the opinions and the judgment of that distinguished man and accomplished gentleman—I enclose the copy herewith.

The letter was addressed to a member of the Legislature of our Commonwealth, while a strong prohibitory and penal bill was pending before that body, and many years after the writer had retired from any active participation in public affairs. As an argument against coercive measures in aid of temperance, it may be as applicable now as it was at the time it was written, and at any rate, it presents the views of one who was strongly opposed to such measures, and who was abundantly capable of judging of their expediency and probable effect.

Your friend and servant,
W. H.

Boston, April 8, 1848.

To William Hayden, Esq., Member of the House of Representatives of Massachusetts:

Dear Sir: You are no stranger to the fact that I have long regarded, with deep interest, the temperance movement in this state. I admit that it has occasioned the most salutary reform in the moral habits of society that the world has ever witnessed; and I have contributed to its progress by all the means in my power, so

long as it was confined to its legitimate object. This, in fact, ought to be considered *simply* as a "*call to the unconverted*," in view of fixing the attention of the individual upon the unsuspected dangers of his own habits, and of displaying the insidious and ruinous temptation to which he is exposed, by precept and example. But I am nearly discouraged in perceiving that the leaders of this reform—yeilding to the propensity of all reformers, except His who "left an example that we should follow his steps"—have adopted a system of coercion instead of persuasion, and attempt to compel the consciences of men by stretching the laws beyond the stringency of the old blue laws of our forefathers. This I lament, not merely because it is wrong in itself, but because it inevitably leads to a reaction that will leave matters worse than they were before the temperance flag was unfurled.

Laws wich stigmatize lawful or innocent actions with the brand of crime, which multiply penalties, which require for their enforcement the base auxiliaries of spies and informers, which encourage confederates for the sake of procuring witnesses, which lumber the tables of grand juries with indictments; which, in a word, are against the grain of great masses of the people—are proverbially curses instead of blessings, and will not be endured by a free people. Of this description were the laws of France, prohibiting the citizens from eating and drinking when and where they pleased. These have subverted the throne and shaken the foundations of the state. The consequences here may not be quite as serious, but the cases are analagous. They will provoke the same feelings and the same resistance, in kind, though not in degree.

The extreme right will be supplanted by the extreme left; the teetotallers by the wine-bibbers; the saints by the publicans and sinners; and all restraints upon the traffic in spirituous liquors will be swept away. Men will not, in this age, submit to be scolded, reviled, or whipped into the observance of sumptuary laws. They will sooner break their chains than permit others to break their glasses. The "padlock" of the reformer should be placed on the "mind" of the purchaser, and not upon the door of the vender. This is manifest to all who open their eyes to the signs of the times. In the state of New York the fever of reform, caught here, prevailed in all quarters, and legislation was busy in preventing licensed houses. But the last year the Legislature, after great deliberation and satisfactory experience of the mistake of their predecessors, repealed their act. In Vermont it is stated that the people, by an immense majority of three thousand, declared against the license system. This year, that majority is said to be reduced to one-third. In our state, it is not to be doubted that opposition to the system has increased and is increasing.

Many are restrained from open hostility by reluctance to be classed with the intemperate, many by hypocrisy, many by a

nervous temperament, the fear of calumny and hard names. Meanwhile a strong sympathy is created with those who, having been bred to a vocation which the laws allowed, and embarked their capital in it, are threatened with deprivation of their means of subsistence, and denounced as bad members of society. All these are brooding over their discontent, and preparing, some of them unconsciously, to combine with any party in putting down those who deny them the exercise of the most natural of rights—of appeasing thirst by the choice of their own potations—and who, by forcing all to drink water, would prevent many from gaining their bread.

It is the undisguised object of the prominent reformers to procure the enactment of such new laws, or to countenance such construction of the old laws as will, in effect, amount to *a total prohibition* of the sale of spirituous liquors, and of consequence to prevent their consumption—at least, to confine it to *a privileged aristocracy* of those who can afford to buy and "drink a hogshead out." This object is, in other words, *to regulate the diet of the people* by investing a majority with the power to control the economy of private families through the aid of the legislative or municipal authorities, or a concurrence of both. A claim so extravagant, oppressive, and in fact absurd, cannot have been viewed in its true light by many worthy persons whose zeal is the cause of, and may be the excuse for overlooking first principles, and unwarily adopting the doctrine that the end justifies the means.

If prior to the reform movement, the question had been propounded to these worthy persons—Does it consist with the nature of the social compact, that one portion of the community should prescribe to another what they shall eat or what they shall drink, either by legislative acts, indignation meetings, brow beating, maledictions, or otherwise? they would have laughed the notion to scorn. But there is no monster of "mien so hideous" that will not appear an angel of light when robed like the "veiled prophet." The maxim that the majority must govern, is the veil thrown over this monstrous claim—a maxim of universal application to the political relations of a free people, but of very limited application to their social condition. Certainly it can not with justice be made to bear upon the actions of families or individuals, except so far as they are criminal in themselves or affect directly the public health, peace, or morals.

To transgress this limit, is to go to sea without chart or compass. No *principle* can be suggested, which discriminates the right to control a man's potations, and not his food. For the above objects of public policy, and for none other, the sale of spirituous liquors may be limited to particular locations, and confined to men of approved character; so may the sale of beef and mutton. Grog shops are not more lawfully under the control of legislation than shambles. Both may be regulated, with a *bona fide* view to the prevention

of nuisances. Neither can be rightfully *prohibited;* and laws which, under the pretext of *regulation*, aim at *total suppression*, are legislative evasions; in homely phrase, "Yankee tricks," "whipping the devil round the stump," and quite below the dignity of our political fathers.

Another view of the subject. The best definition of liberty, perhaps, is the facility of doing what the laws permit; and the most wretched condition of slavery is, proverbially, that in which the laws are uncertain, or unknown. They are *both*, when made to conflict with each other. The laws of the United States admit the importation of spirituous liquors, and raise revenue from it. This inevitably involves the right to sell the imported article, in virtue of the supreme law of the land, subject only to laws of the states made for regulation of their domestic police. This power to regulate is partial, and must be consistent with the paramount general power to import and sell. It is an exception which should be so construed as to stand with the rule. But to convert the exception into the rule, is to bring the law of the state into conflict with the supreme laws of the Union. Thus, while these supreme laws permit a particular traffic, and the United States participate in its profit by filling their treasury, the laws of an inferior jurisdiction, according to modern construction, condemn the traffic, and doom its agents to fine and imprisonment.

This construction of the state law by the municipal authorities —reposing upon legislative countenance—whereby they assume to withhold *all licenses*, and thus substantially interdict *all sales*, and all consumption, at their discretion, is a huge pretension, at variance with the uniform procedure of our ancestors, ever since the first settlement of the country. It is not less repugnant to the principles of a free government, whose laws should be equally applicable to all the citizens, irrespective of their habitancy. But as the license laws are administered—with the countenance of the Legislature—the citizens of one town are subject to one law, and the citizens of an adjacent town to another. In one they may sell with impunity, in the other, they may be sent to the House of Correction. All are liable to annual vicissitudes and changes of position, from the grog shop to the prison, and back again, at the will or whim of a bare majority of aldermen or commisioners, which may chance to be of the teetotal or free trade school, or one of whom may happen to be absent when the question, "to drink, or not to drink," is taken, after argument by counsel learned in the law. Thus it may happen that the unlicensed seller in Boston may be this year doomed to the House of Correction, and before his term of confinement expires, forty others may be pursuing the same trade under licenses from another Board of Aldermen. Again, the Supreme Court, sitting in Middlesex, may confirm a judgment rendered in Suffolk against a seller of wine, and while he is suffering in prison, may order

their own wine from a licensed retailer, without any violation of law or decorum. Thus the character of crime is to depend on the demarkation of town lines. These incongruities ought to suffice to demonstrate this arrogation of power to be a flagrant usurpation. If the Legislature can not, by its own act, stop all sales, much less can it invest the municipal government with any such powers. The right to interdict a trade, if it existed in the Legislature, must be a *unit*, and unalienable. All that can be delegated is, not the *power itself*, but the authority *to execute* the statute. The law decides that licenses *may be* granted by subordinate authorities. All laws are intended to have effect; but this object is frustrated when those who are intrusted with their execution refuse to act. They, in such cases, become legislators and repealers. They resolve that licenses *may not* be granted; and, when such refusal becomes universal, which it is the object of some legislators to make it, the law itself becomes a dead letter on the statute book.

The true and manly course, for the advocates of these anomalies, would be to move, in plain terms, for a prohibition to *drink* wine or spirits, and to enforce penalties against the *drinkers*, who are the parties at fault. There is certainly nothing wrong, *in itself*, in the sale of spirits. The mere sale of a bottle of wine is not, *intrinsically*, worse than the sale of a Bible. There is nothing good or bad in either act. The whole fault consists *in the drinking*. If this is wrong in a citizen of Massachusetts, it must be equally so in those who come within our jurisdiction from other states and countries. It would be fair, however, to warn these against coming hither, to banquets or other symposia. They might otherwise be misled; as in the public papers a few month since, Judge Story's wine was advertised for sale, as having been especially imported for the use of the Judges of the Supreme Court of the United States: and, in the same papers, was to be seen a notice of the lectures of Mr. Gough, the reformed drunkard.

It seems that a bill has lately been reported to the House of Representatives, imposing prohibitions upon the sale of spirituous liquors, but excepting from its penalties sales for *sacramental* purposes. This presents an effort to blend and reconcile a divine injunction with a secular prohibition, that would seem to be of a revolting and irreverent character to those who do not justly appreciate the good intentions of its movers. It conclusively implies that our blessed Savior, in His last mournful and heart-breaking interview with His disciples, consecrated by His example and command, a libation proper to be used always in celebration of His memory, but deserving to be eschewed on other occasions, as a curse and poison to mankind. And can it be imagined that when in connexion with this sublime solemnity, He declares "I will not drink henceforth of this fruit of the vine, until that day when I drink it new with you in My Father's king-

dom," He would have chosen to allegorize His celestial occupation by an allusion to a worldly malpractice? That persons with this impression can feel themselves edified by a participation of the consecrated elements, is quite beyond my comprehension. The Savior was entirely familiar with the numerous instances in which excessive indulgence in strong drinks is held up as an abomination in the Old Testament from the days of Noah, and certainly could have regarded it in no better light. But the first miracle, and other facts in history, demonstrate that He did not hold the abuse of any of the gifts of Providence by some, as conclusive against their moderate use by others. He well knew our human proclivity to the abuse of all the appetites and passions. But His instruments of reform were sermons, and parables, and example. And His servant, St. Paul, in conformity, says to the Colossians, "Let no man judge you in meat or in drink."

In a word, my dear Sir, I must believe, that the sooner we revert to the old usages of the Bay State, the happier it will be for all. It is devoutly to be wished that our Legislature, reposing upon its known abhorrence of the vice of intemperance, and its manifold protestations against it, may pause in their attempt to reach, by legislation, what is unattainable, and which will only develope the worst feature of a bad government—ill-humor among the people at large. Let them leave the rest to the teachings of example, to the temperance societies, and to Father Mathew. This worthy person may be expected to display in more graphic colors than Hogarth, the contrast between "Beer street and Gin lane" and the advantages of "Water street" over both; and all good members of society will second his efforts.

I venture to make these suggestions to you, and to place them at your disposal. With an experience in the legislation of Massachusetts, equal, I believe, to that of any living person, I have an abiding conviction, that I never have witnessed any attempt to legislate so adverse to the rights of man, as some which are made in our General Court, respecting the subject of temperance. They are a prelude to a system of sumptuary laws, which, if not resisted, will become a substitute for family government. Some body ought to speak out, in opposition to this course. Some body who has no personal interest, and no friend or connexion interested in the result—who drinks but little, who was never in the habit of drinking much, and who has no occasion to recur to a vender of spirituous liquors to replenish his stock. I do not add my name, not presuming that it can have much influence with the generation that has grown up since I have become dead to the busy world; but if any of your friends have the curiosity to know whether the writer comes fairly within the above category, you are at liberty to mention it.

I am, very respectfully and faithfully,

Your old friend,

ANTIQUARY.

DECISION

OF

THE SUPREME COURT

OF THE

SECOND JUDICIAL DISTRICT OF THE STATE OF NEW YORK.

BEFORE BROWN, STRONG, AND ROCKWELL, JUSTICES.

The People of the State of New York, upon the complaint of JOHN E. VASSAR, against PHILIP BERBERRICH. J. F. BARNARD and H. A. NELSON for Prisoner. J. THOMSON and T. C. CAMPBELL for People.

The Same, upon the complaint of JOHN MATHEWS, against THOMAS TOYNBEE. JOHN A. LOTT and A. HADDEN for Defendant. JOHN VAN COTT and N. F. WARING for People.

BROWN, J.—Phillip Berberrich, the defendant in the first of these actions, was arrested under the act of the 9th of April, 1855, entitled "An act for the Prevention of Intemperance, Pauperism, and Crime," charged with having in his possession, with intent to sell, and with having sold, intoxicating liquor, called lager bier. He was brought before E. Q. Eldridge, Esq., County Judge of Dutchess County, and upon a trial by jury, was found guilty. At this stage, and before sentence, the proceedings were removed into this court by *certiorari*.

Thomas Toynbee, the defendant in the other action, was also arrested, under the same act, without warrant, by John Mathews, a police officer, and brought before D. K. Smith, a police justice of the city of Brooklyn, and there charged with being in the act of selling intoxicating liquor, to wit: one glass of brandy—and, also, with having in his possession other intoxicating liquors, to wit: champagne wine, with intent to sell the same. The wine was seized by the officer. At a trial before the justice, without a jury, sitting as a court of special sessions, Toynbee was found guilty, and sentenced to pay a fine of fifty dollars, with five dollars eighty-seven cents costs, and to be committed until such fine and costs be paid, for a period not exceeding fifty-six days. It was also adjudged, that the liquor seized be forfeited, and a warrant issued for its destruction. The defendant appealed to the general term of this court, and thus we have the principle questions which arise upon the construction of

the act—its force and obligation as a law, presented for the consideration and judgment of this court.

The object to be effected by the statute under which these proceedings are had, must be ascertained from an examination of its various sections—twenty-six in number. If its office is one of mere regulation—to prescribe by whom and to whom, and at what places, liquors in certain quantities may be sold—then it does no more than exercise the law which it is thought to supersede; and although prejudicial to existing interests, and may subject certain classes to some privations and inconveniences, it is nevertheless, a law of binding obligation, which the people must obey, and the tribunals of justice enforce. If, however, its office and purpose is greater and more comprehensive than mere regulation —if it aims at prohibition—prohibition of sales as well as of general and ordinary uses, to an extent which deprives the subject of the law of its value, and strikes down the vast and varied interests concerned in its importation, sale, and production—if it provides for the seizure, forfeiture, and destruction of an article or thing, the product of human industry hitherto invested with the attributes of property, solely because its producers or owners design to make it the subject of sale and transfer, to deal in it and with it, as property, and apply it to general uses, then the question assumes a very different character, and we are brought to inquire whether an act pregnant with such consequences, and armed with such unusual and dangerous powers, is really within the sphere of legislative authority. It is just to observe, that while sales by persons generally and for general uses are expressly forbidden, there is no positive interdict against its general use when lawfully acquired. Yet, as there can be no lawful sales after the act takes effect, except by the authorized venders, for certain special purposes, and as the act is careful to impose one of its penalties upon purchasers from authorized venders, under a false representation that it is designed for an authorized use, it seems clear that the intent was to interdict the general use.

Section one forbids the sale, and the keeping for sale, or with the intent to sell, except in the cases enumerated in the subsequent sections, and, also, in the case mentioned in the last clause of the same section, which clause is supposed to be of doubtful import. The sales excepted from the prohibition of the first section, other than those in the latter clause, are sales to authorize venders, and sales by them for mechanical, chemical, and medicinal purposes, and of wine for sacramental uses. Also, sales of cider, in quantities not les than ten gallons, sales of alcohol by manufacturers, of wine from grapes grown by the seller, and of foreign liquor, in the original packages, to authorized venders. Section four declares offences against the act misdemeanors, and provides for their punishment by fines and imprisonment. Section five designates the officers who shall have cognizance of such offences, and prescribes the form of the proceedings, and of the trial. Sections six and seven

contain what are called the search and seizure clause; and section ten provides for the condemnation and destruction of the liquor. Section twelve authorizes sheriffs, marshals, constables, and policemen to serve the process, arrest persons in the act of selling, and to seize, without warrant, liquor kept against the provisions of the act. The owner may interpose a claim to the liquor seized, pursuant to the provisions of section seven; but he must first purge himself, under oath, of any design to disobey or evade the law, before he can be noticed or heard. Section sixteen deprives the owner of his right of action to recover the value of any liquor sold to a purchaser, or taken, detained, or destroyed by a wrong-doer, unless he shall prove that such liquor was sold according to the provisions of the act, or was lawfully kept and owned by him.

And section seventeen declares, that, upon the trial of any action to enforce the penalties and forfeitures, proof of a delivery shall be deemed evidence of sale, and proof of sale shall be sufficient to sustain the averment of unlawful sale. Section twenty-five declares all liquors kept in violation of any of the provisions of the act a public nuisance. The abatement of public nuisances is one of the remedies by the act of the party which the law concedes to any person injured, and he may proceed to the removal and destruction of the nuisance without the process or judgment of any court. (3 Black. Com., 5.) So that, if this clause is to have any effect, it can be none other than to invite and justify depredations upon the proscribed article. These provisions are vindictive. They are novel and unusual. If we except some few states of the Confederacy, who have recently entered upon a similar course of legislation, they have never before found a place in the written code of a civilized country. They are designed to work a forfeiture of goods—a deprivation of liberty and property—by means unknown to the common law. They set aside the just and humane rules of evidence, approved by time and sanctioned by sound philosophy. They assume a delivery to be a sale, and proof of a sale sufficient to sustain an averment of unlawful sale. And they refuse to notice or hear a citizen in defence of his own property, unless he first submit to take the oath demanded by the act, and disclose the facts upon which he relies to establish his innocence. It awakens strange emotions in this age of progress and improvement, to behold enactments like these embodied among the written laws of a people distinguished for their moderation, their moral excellence, their love of justice, and their ready perception of the distinction between right and wrong—a people of Anglo-Saxon lineage—versed in the jurisprudence of Coke and Blackstone, and Kent and Story, and who are proud to trace the fundamental principles of their government upward, through the revolutionary struggles of 1776 and 1688, the conflicts and trials of the Great Rebellion, back to the Conferences of the Barons at Runnymede.

Impressed by the novel and extraordinary features of the act, and the doubts suggested by its perusal, I turn to the organic law as the true test of legislative power, and regardless for the time of the subordinate questions involved in the controversy, proceed to inquire whether its provisions do not fall within the prohibitions of the Constitution. I shall assume for all the purposes of this argument, that the prohibitions of the act extend as well to liquors, which are the growth and manufacture of foreign countries, as to those which are of domestic origin. Indeed, if we look at its title—to which resort may be had to remove ambiguities when the intention of the lawgiver is not plain—and read the closing sentence of section one—which is thought to exclude foreign liquors—in connexion with that part of section twenty-two which declares that it shall not be construed "to prevent the importer of foreign liquor from keeping or selling the same to any person authorized by the act to sell such liquors," the intention of the Legislature to include both kinds can hardly admit of a doubt. The exception upon which the uncertainty arises, proceeded, doubtless, from a desire that the law should conform to the decision in Brown *vs.* The State of Maryland, referred to hereafter. And the obscurity and want of precision in the language employed, must, upon the usual rules of construction, yield to the intention, when that can be ascertained from an examination of the law itself.

In neither of the cases under consideration, were the defendants impleaded or brought to trial upon the indictment of a grand jury. Indeed, the law contemplates no preliminary inquiry by the grand inquest. The counsel for the defendants insist, that in this respect it is in conflict with that part of section six of first article of the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, (except, &c.,) unless on presentment or indictment of a grand jury." This involves an inquiry into the character of the crime created by the act. Is it an infamous crime? Offences which rendered the perpetrator infamous at the common law, were treason, felony, and the *crimen falsi*. It is not easy to define the meaning and extent of the latter term with certainty. It not only involved falsehood, but offences which injuriously affected the administration of justice. It was the infamy of the crime, and not the nature of the punishment, which constituted the *crimen falsi*. Thus, a conviction for libel, or for seditious words, or for keeping a gaming-house, did not render a man infamous.

Wharton's Crim. Law 354; 1 Rus. on Crimes 45; 1 Phil. Evid. 28; Barker *vs.* the People, 20 Johns. Rep. 457; Peak's Ev. 126.

The present Constitution was adopted in 1846. At that time, the term infamous crime was, and still is, defined in the 2d vol. Rev. Statutes, 587, section thirty-one, to include every offence punishable with death or by imprisonment in the state prison,

and no other. Such is also the statutory definition of felony. The framers of the Constitution must have understood, and intended that others should understand the term, in the legal sense then given to it. And it does not embrace the offence created by the act under consideration. It is not, therefore, a valid objection, that the defendants were impleaded and put upon their trial without the indictment of the grand jury.

We have already seen that the object of the law is prohibition. For general and ordinary uses—for all but a few special purposes—liquors having intoxicating properties are to be banished from society, and neither bought nor sold. The trades and employments connected with their importation, manufacture, and distribution, are to be suspended or put down, and the interests which supply such trades and employments with capital, raw material, labor, and means of transport, are to find other fields of enterprise, or be put down with them. This brings me to consider the principal question discussed upon the argument—which is this: Does the legitimate authority of the Legislature extend to the enactment of laws prohibitory of the common and ordinary use of property? Can this department of the government, in the execution of the trusts confided to it, declare by statute an article or thing, the product of human industry, or the creation of human skill, long recognized as property, and of all but universal use, and perfectly inoffensive in itself, to be a public nuisance, and thus authorize and justify its destruction. It is worth while, before we proceed further, to inquire what the proscribed article or thing is—to consider its qualities and uses, and whether it is invested with the attributes of property, so as to entitle it to the protection of the Constitution.

The taste for intoxicating drinks is thought to be an instinct of our nature—an operation of the principle of organized life, and not an artificial appetite or desire peculiar to races or tribes, and induced by habit, or climate, or other external influences. History and tradition corroborate the results of chemical and physiological investigation. With the earliest Hebrews, the most ancient Egyptians—with the refined and intellectual Greeks, and the robust and resolute Romans, wine was the favorite beverage, if not a part of the customary food. Among the nations whose empires were upon the shores of the Mediterranean and its adjacent seas, long before the Christian era, the fruit of the vine and the olive, together with the cereal grains, were the staple products of agriculture, and the principal article of trade and commerce. "Savage and civilized tribes, near and remote—the houseless barbarian wanderer, the settled peasant, and the skilled citizen—all have found, without intercommunion, through some common and instinctive process, the art of preparing fermented drinks, and of procuring for themselves the enjoyments and miseries of intoxication. The juice of the cocoanut tree yields its toddy wherever this valuable plant can be made to

grow. Another palm affords a fermented wine, on the Andean slopes of Chili; the sugar palm intoxicates, in the Indian Archipelago, and among the Molluccas and Phillipines; while the best palm wine of all is prepared from the sap of the oil-palms of the African coast. In Mexico, the American Aloe gave its much-loved pulque, and probably, also, its ardent brandy, long before Cortez invaded the ancient monarchy of the Aztecs.

"Fruits supply the cider, the perry, and the wine of many civilized regions—barley and the cereal grains, the beer, and brandy of others; while the milk of their breeding mares supplies at will, to the wandering Tartar, either a mild, exhilarating drink, or an ardently intoxicating spirit. And to our wonder at the wide prevalence of this taste, and our surprise at the success, with which, in so many different ways, mankind has been able to gratify it, the chemist adds a new wonder and surprise, when he tells us that, as in the case of his food, so in preparing his intoxicating drinks, man has every where come to the same result. His fermented liquors, wherever, and from whatever substances prepared, all contain the same exciting alcohol, producing every where, upon every human being, the same exhilarating effects." The wines of France, Italy, and Spain—the beer of the German states, and the ale and porter of the British Islands—enter largely into the domestic consumption of the inhabitants of those countries, as a part of their daily food. With our own citizens, the use of fermented liquors, in some form or other, is all but universal. Either as a beverage, or in the preparation of their food, few families are entirely without it. Should these facts suggest the probable result of a movement to quench an appetite so prevalent, and so deeply seated, by interdicting the use of the means, which a wise and beneficent Providence has every where furnished for its gratification, they also show, that whenever, and wherever, man rises above the savage condition, and begins to exhibit the rudiments of civilization, intoxicating drinks, and the fruits, and plants, and grains, from which they are expressed or extracted, are among the first things which he separates from the common stores of nature, appropriates to individual use, and impresses with character and attributes of property. Chemical and physiological science, must determine whether alcohol, the essential element of intoxicating liquors, is food for the invigoration, or poison for the destruction of the humun system. The law is only concerned to know, whether they fall within the catalogue of things, which it recognizes as property. I find no definition of property that does not apply to intoxicating liquor. It has been separated from the common stock of nature, for private use. It is that over which man may exercise absolute dominion, to the exclusion of every other person. By many it is regarded as an article of diet; by all as one of trade. It is bought and sold, lost and acquired, like other property. The law in question, treats it as property—authorizes its sale,

under certain limitations, and for certain prescribed uses. And when it speaks of its forfeiture, it means a forfeiture of the right of property. In every sense of the term, it is property, endowed with the same rights, and subject to the same measure of control, as other property, and no more.

The learned counsel for the people, in the case against Toynbee, insists that the legislative department of the state, being founded upon the model of the English Parliament, has power to declare and limit the uses, to which property may be applied, and when it shall cease to be property. This power, he argues, results; 1. From the express grant of the Constitution; 2. From the general illimitable nature of legislative power, required for the ends of society; 3. From being co-extensive with the law making power in a democracy; and, 4. From the fact, that discretion, legislative, and judicial, is, in its nature, exclusive, and subject to no control. This, doubtless, is a true exposition of the power of the Parliament of Great Britain, which is said to be "so transcendent and absolute, that it cannot be confined, either for causes, or persons, within any bounds." So thought Lord Coke.

4 Inst. 36, and Black. 1st Vol. Com. 140.

Such also is the opinion of Chancellor Kent,

1 Vol. Com. 448,

in his remarks upon Coke's expression in Bonham's case, and upon that of Lord Hobert, in Day v. Savage, and of Lord Holt, in the City of London v. Wood. Names, eminent as jurists and statesmen, are not wanting, who maintain that there are limitations upon legislative power, not written in the Constitution, which are implied from the nature of popular sovereignty, and representive government. I decline to enter that field of inquiry, because, for present purposes, and indeed, for any purpose designed to secure property, and liberty, and life, from agression and misrule, the written limitations will be found amply sufficient, if expounded and applied in a liberal and resolute spirit. They come down to us from Magna Charta, and are sanctioned and approved by the wisdom and experience of near seven hundred years, and under our system, are intended to save absolute inherent rights, from the force of legislative acts, which interrupt their enjoyment, or impair their value.

Among the absolute inherent rights of persons, Mr. Blackstone, (Com. vol. 1 138,) enumerates the right of property, which "consists, he says, in the free use, enjoyment, and disposal of all his acqusitions, without any control or diminution, save only *by the laws* of the land. And by a variety of ancient statutes, it is enacted, that no man's lands or goods shall be seized into the King's hands against the Great Charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law." The words "by the laws of the

land," and " by course of law," here referred to, and the words " due process of law," found in the sixth section of the first article of the Constitution, are synonymous, and have the same legal import and effect. We shall presently see what this is. England has no written constitution, and therefore Parliament is said to be so transcendent in its authority. The provisions of the Great Charter, and the acts of latter times, for the protection of life, liberty, and property, are statutory regulations, which Parliament may repeal or modify at pleasure. They are limitations upon the power of the Crown, and not upon that of Parliament.

The masses in Great Britain have never yet attained to the consequence and dignity of a contest, for their absolute inherent rights, except through the legislative and the judicial branches. It is a historical truth, that the struggle there, has constantly been to put the real or pretended prerogatives of the Crown under restraint—sometimes by the barons, as in the time of the Great Charter; sometimes by the judges, as in the time of Lord Coke; and sometimes by the Parliament, and especially the House of Commons—as in the times of the great rebellion, and the act for the settlement of the succession in 1688. We have incorporated the prohibition of the English statutes, for the protection of life, liberty, and property, into our Constitution, not as limitations upon executive authority, but as limitations upon legislative power. The same unrestrained dominion over property, which the Parliament and people of Great Britain have denied to the Crown, and reserved to Parliament, the people of the State of New York, have denied to the Legislature, and reserved to themselves.

The latter clause of sec. six of the first art. of the Constitution, is in these words: " No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled in any criminal cause to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." These provisions are not to be narrowed down by a literal construction. They are to be largely and liberally expounded. Their object is to secure the enjoyment of the rights to which they refer, and must have an interpretation, which will effect that object. The terms " life," " liberty," " property," and " due process of law," as they stand in the section, become of vital consequence, in giving it a construction. To be of any real value, they must have a fixed, permanent, signification—one that shall remain unchanged by circumstances, or time, or the caprice of those to whom the restraining words of the section may become offensive, or troublesome. The Legislature may declare, what a particular term or expression means, when used in a statute. This is a customary and unexceptionable act, but it cannot declare what the same term or expression means, and thus enlarge, or restrain its signification, when used in the Constitution. It is of no consequence, what the Legislature think of it,

or what they attribute to it. The real inquity is: What did the framers of the Constitution mean by it? and what was its known legal definition and signification, when the Constitution was adopted? The word "property," must comprehend now, whatever it comprehended in 1846. Any other rule would place, at the absolute disposal of the Legislature, every right intended to be secured and consecrated, by the limitations I have quoted. The right of property, as we have seen, consists in the "free use, enjoyment, and disposal." Its incidents are the enjoyment, use, and power of disposition. How are we to designate, classify, or define, an interest, or an estate, which cannot be used, enjoyed, or sold, and transferred? By what words and expressions, shall we impart to others our idea of its nature and qualities?

There can be no property in the legal and popular sense of the term, where neither the owner, or the person who represents the owner, has the power of the sale and disposition. That which cannot be used, enjoyed, or sold, is not property; and to take away all, or any of these incidents, is, in effect, to deprive the owner of his right of property. This is precisely what the act "for the Prevention of Intemperance, Pauperism, and Crime," is intended to accomplish, and precisely what it will accomplish, if it can be enforced; for it declares, that the subject to which it refers, shall neither be sold, or kept for sale, or with an intent to be sold. The statutes may, and it is their office, to prescribe the forms by which sales may be affected; that the title to real property shall only pass by deed, acknowedged before an officer, or attested by a witness; that personal estate shall only pass by delivery in writing, or the payment of purchase money; that poisonous drugs, when sold, shall be so labelled. They may, also, declare that intoxicating liquors shall not be sold to minors, paupers, or habitual drunkards, or to be drank in the house of the seller, or by retail, to be taken out of the house, unless he have a license, and be of good moral character, &c. These are mere acts of regulation and conservation, and do not, in the least, impair the right of property.

There is another right incidental to the right of property, which, when abrogated, or suspended, tends to the deprivation of property. That is, the right of action—the right to the protection of the laws, and to redress by the legal tribunals. The forms of actions and of legal proceedings, the mode by which civil injuries are redressed and rights asserted and defended in the courts, are classed as remedies, and are doubtless subject, generally, to legislative supervision and control. But when the law-making power comes to deal with the absolute inherent rights referred to in the sixth section of the first article of the Constitution, forms and modes of proceedings, from being mere remedies, rise to the dignity of rights which cannot be denied or withheld. The principle is asserted by Mr. Justice Washington, in Green vs. Biddle, 8 Wheaton Rep. 1, 75, in the following language: "Nothing

can be more clear, upon principles of law and reason, than that a law which denies to owner of land a remedy, &c.; or which clogs his recovery of possession, by conditions and restrictions, tending to diminish the amount and value of the thing recovered, impairs his right to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure, according to the nature and the extent of such restrictions." Blackstone, in his Com. Vol. 1, p. 55, says: "The remedial part of a law is so necessary a consequence of the two former, (the declaratory and directory parts,) that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering or asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

Mr. Justice Taney, in delivering his judgment in Bronson vs. Kinzie, 1 Howard's Rep. 311, and applying this principle to laws which impair the obligation of contract says:

"Although a new remedy may be deemed less convenient than an old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contracts; but if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

In Holmes vs. Lansing, 3 Jour. Cases 75, Chancellor Kent, speaking the judgment of this court, says: "So long as contracts were submitted without legislative interference to the *ordinary and regular course of justice*, and existing remedies were preserved in substance and with integrity," the Constitution was not violated. And judge Denio, in pronouncing the judgment of the Court of Appeals, in Morse agt. Gould, 1 Kernan 281, also says:

"It is admitted that a contract may be virtually impaired by a law, which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies when the contract was made, are substantially defeated."

With this necessary qualification, the jurisdiction of the states over the legal proceedings of the Courts is supreme. These authorities sufficiently indicate the distinction between rights and the remedial process of the law for their vindication when wrongfully withheld or invaded, and they also define and mark the utmost verge and limit of legislative power when applying

remedies to absolute inherent rights which the people have reserved to themselves by the limitations of the Constitution. This right of action to redress and protection, by the venders and owners of intoxicating liquors, is seriously impaired—if not in effect destroyed—by the conditions imposed by the latter clause of the sixteenth section of the act in question.

Those provisions of this act which I have endeavored to show tend to the deprivation of property, cannot, by any process of reasoning, be brought within the meaning of the terms, "by the laws of the land," and "by course of law," used in the English Statutes, or the "due process of law," of the sixth section of article one of the Constitution. Lord Coke says, that the words "by the law of the land," mean by the course and process of law "by indictment or presentment of good and lawful men, where such deeds be done in due manner or by original writ of the common law." "The law of the land, in Bills of Rights, does not mean merely an act of the Legislature, for that would abrogate all restraints upon legislative authority. The clause means, that the statute which deprives a citizen of the rights of person and property without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the Constitution."

Hoke *v.* Henderson, 4 Dev. 1.

"The words 'due process of law,' in this place, cannot mean less than a prosecution or suit, instituted and conducted according to the forms and solemnities, for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachments is extended to life, liberty, and property, and if the latter can be taken without a forensic trial and judgment, then there is no security for the others. If the Legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law."

This expressive language of Mr. Justice Bronson, in

Taylor *v.* Porter, 4 Hill 140,

has often been quoted and cannot be too often repeated. It should be engraven upon the walls of the legislative chambers as a perpetual memorial that there are bounds to legislative authority. Vide, also, the opinions of Judge Denio, and of the late Mr. Justice Edwards in

Westervelt *v.* Gregg, 2 Kernan, 202.

"The prescribed forms and solemnities for ascertaining guilt, or determining the title to property," comprehend as well the forms of procedure as the legal presumptions and rules of evidence by which the guilt is to be ascertained or the title determined. These presumptions and rules are also a part of the remedial process of the law, and their alteration and modification

is doubtless, to a certain extent, within the power of the Legislature; but in cases which affect the personal rights secured by the Constitution, the changes must leave the right unimpaired and place no material impediments or obstructions in the way of those who are concerned in asserting it. In trials for crimes, and to enforce penal statutes, the presumption of innocence obtains until it is disproved, in all cases, and in trials to redress civil injuries and enforce civil rights, the presumption of title and right is with the defendant until it otherwise appears, unless in his pleadings he voluntarily assumes the *onus probandi*. In proceedings which aim at the deprivation of liberty and property, by fines and forfeitures, and the pains of imprisonment, that is not due process of law which reverses the wholesome and humane rules of the common law, and substitutes the presumption of wrong and guilt for that of right and innocence. In this respect the provisions of section seventeen of the act are highly offensive.

Nor can the force and efficiency of the constitutional limitations be evaded or averted by the declaration of the twenty-fifth section of the act, that intoxicating liquors are a public nuisance. In the words of Chief Justice Ruffin, "such a construction would abrogate all restrictions on legislative authority." If a class of citizens can be deprived of a particular kind of property by a legislative declaration that it is a public nuisance, then another class may be deprived of liberty by a legislative act proscribing them as malefactors and felons. Grant this power to the Legislature, and the limitations of the Constitution are no longer of any value. Every kind of property may be put without the pale of the laws and the protection of the courts, and exposed to seizure and forfeiture by a simple act declaring the proscribed article to be a public nuisance. The existence of such a power is inconsistent with the theory of a limited representative government, because it is destructive of the ends which such government is designed to accomplish. The twenty-fifth section proceeds upon a misapprehension of what a nuisance is. Common or public nuisances are offences "against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing which the common good requires."

4 Black. Com. 166.

Impediments and obstructions placed in highways and navigable streams, are nuisances *per se*, because they interrupt the passage and thereby annoy others. Trades and manufactures of certain kinds become nuisances from the places where and the manner in which they are conducted. Animals, such as dogs, swine, &c., are not nuisances until they become offensive by being suffered to run at large or kept in the vicinity of men's habitations. So an accumulation of vegetables and fruits in process of decay, the flesh and offal of animals, gunpowder, drains and sewers in cities and populous places, may or may not become

public nuisances by their localities and other attendant circumstances.

The true test is, that the thing, trade, or business is in some way detrimental to the public, for the elementary writers say, "common nuisances are such inconvenient or troublesome offences as annoy the whole community in general, and not some particular person." Common nuisances may be abated or removed by the party annoyed or injured, who is not required to wait for the slow progress of the ordinary forms of justice. Liquors that intoxicate, exhibit none of the qualities which constitute a common nuisance. They obstruct no navigable rivers, and impede the passage of no public highways. They create no noise to disturb the public tranquility and peace. They exhale no offensive odors to taint the air and impair public health. Nor do they endanger the security of persons, or of other property, by a tendency to ignition and explosion. In the stores of the importer, the vaults of the brewer, and in the cellars of the wine grower and consumer, they are as harmless as the wood or glass in which they are inclosed. He who knows how to enjoy them, with reason and moderation, or has the moral courage and self denial to let them alone, may consider himself free from annoyance and danger. They may be, and doubtless are, converted to base uses—uses which produce "intemperance, pauperism, and crime," and, I may add, moral degradation and grief, and anguish unspeakable. And then the places where they are thus used, and those concerned in prostituting them to such uses, fall clearly within the province of legislative regulation and control, and the maxim: *Sic utere tuo ut alienum non lædas*, applies in all its force. But intoxicating liquors cannot be deprived of the defences with which the Constitution surrounds the property of the citizen by an act proscribing it as a public nuisance.

There are some observations of Justices Taney and Woodbury, in the opinions delivered by them in the cases against the states of Massachusetts, Rhode Island, and New Hampshire, 5 Howard 504, which are thought to favor the idea that the states may pass laws prohibitory of the uses and sales of ardent spirits, subject to the right of importation and of sale by the importer. Those who attach any value to expressions which are *obiter dicta*, and not necessary to the decision of the precise question under examination, will do well to remember that the language referred to, asserts the absence of any thing in the Constitution of the United States, which forbids the passage of prohibitory laws, and nothing more. The cases in which the observations occur, determined that the excise laws of the several states, named in the proceedings, did not conflict with the authority given to Congress to regulate commerce with foreign countries and among the several states, and nothing else. The power of a state exercising its sovereign authority, is that to which these learned judges refer; but the power of a state Legislature, exercising its authority

under such restraints and limitations, as its constituents may have imposed upon it, is quite a different thing, and one which they did not consider. The question here is not what the Legislature might do, were these limitations removed or modified, nor what the people of the state might do, by an amendment of the organic law, but what the Legislature may now do with the limitations in full force.

A distinction has also been suggested betwen the power of the Legislature, over property in liquors acquired and existing at the time the act took effect, and property in liquors acquired afterward. The act itself recognizes no such distinction, and does not discriminate between present and future acquisitions, but applies its penalties, forfeitures, and disabilities, with unsparing rigor to those who now own, and to those who may hereafter own, such property. In this respect, I think it entirely consistent with itself, for a constitutional security, which does not cover future, as well as present, acquisitions is of no practical value, and will afford no sort of guaranty against intentional or mistaken aggression. Here are a class of citizens, who have invested their property, and spent the best years of their lives, in learning, and establishing a particular business or trade, innoffensive, and commendable in itself—the growth and manufacture, it may be, of wine—the culture of barley, and hops—the manufacture of fire-arms and gunpowder—the fabrication of types, printing presses, and paper—and then comes a legislative act, confessing its incompetency to invade or disturb existing interests, and, declares, that because wine and the decoction of barley and hops, may lead to intoxication—fire-arms and gunpowder to war, bloodshed, and the destruction of human life; and types, printing presses, and paper, to blasphemous, libellous, and obscene publications—all future acquisitions of the kind, shall cease to be regarded as property, and be no longer entitled to claim the benefit and protection of the laws.

Let this fancied distinction, between present and future acquisitions, once obtain, and property will not hereafter depend for its security upon a permanent rule of constitutional law, but upon legislative moderation and forbearance, and such limitations as legislative wisdom and discretion may put upon its own authority. But let us look upon this distinction in another aspect. Brown vs. The State of Maryland, 12 Wheaton 419, decides, that a state law, requiring importers of foreign goods, (including liquors,) to take out a license, before proceeding to sell by the bale or package, is repugnant to the Constitution of the United States, and void. In other words, that a state has no power to prohibit sales of foreign goods, by the importer, in the bale or package, in which they were imported. It was argued in behalf of the state, that whenever the goods entered its jurisdiction, the power of Congress ceased, and that of the state was substituted in its place. Chief Justice Marshall answered the argument in this

wise: "Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficiency should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importations be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation, and is one essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the entire thing, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." Here then is a positive affirmation that the right to sell, by the importer, is a component part of the power to regulate commerce, and that Congress may, in disregard of state legislation, authorize the importer to sell. Now, the right to sell by the importer, implies the right to purchase by some other person, because there can be no sale if there is no person to purchase. Had the state of Maryland, in place of prohibiting sales by the importer, gone further, and prohibited purchases from the importer, by its own citizens, can there be a doubt, that such a prohibition to purchase, would have been held equally void, as the prohibition to sell, and equally hostile to this exclusive right of Congress to regulate commerce? When, therefore, a citizen of the state of New York, becomes the purchaser of foreign liquor, from the importer, he acquires a right of property, under the paramount law of the United States, as sacred and secure from legislative invasion and aggression, as rights of property, which were vested at the time the law under consideration took effect.

If the judgment in the case of Brown vs. The State of Maryland, and the reasoning of the Chief Justice is entitled to any weight as authority, it is decisive of the question so far as sales of foreign liquors by importers is concerned. The right of importation, we see, means the right to introduce foreign goods into the country, and to sell them to those who may choose to become purchasers. If state legislation can substantially take away from the mass of its citizens the power to become purchasers, a state can, in effect, impede foreign trade and put an end to foreign importations. It has only to declare—what the act under examination declares—that the importer shall only sell in the original packages, to such persons as the state may license and authorize to become purchasers. Sale is no longer incidental to importation. The importer's right to dispose of his goods in the market, no longer depends upon the authority given to Congress to regulate commerce and intercourse with foreign countries. But it depends, also, upon the disposition of the states to suffer their citizens to become purchasers of foreign commodities. I am unable to

perceive any difference between state resistance to foreign importation, by interdicting sales by, and purchases from, the importer, and resistance by a preventive force stationed upon its own borders. Either mode is an unwarrantable interference with a subject of legislation over which Congress has exclusive control and dominion.

The laws which prohibit intermural interments, referred to upon the argument, stand upon the intelligible and constitutional ground of police regulations to prevent nuisances.

Coats vs. The Mayor, &c., of New York, 7 Wendell 585.

And the statutes which authorize the destruction of buildings to arrest the progress of fire or the ravages of pestilence, are justified by the law of overruling necessity, and is the exercise of a natural right, to avert a great public calamity.

2 Kent's Com. 338; Russell vs. The Mayor of New York, 2 Denio 461.

I therefore arrive at the conclusion, that so much of the first section of the act under consideration, as declares that intoxicating liquor shall not be sold, or kept for sale, or with intent to be sold, except by the persons, and for the special uses, mentioned in the act—so much of sections six, seven, ten, and twelve as provide for its seizure, forfeiture, and destruction—so much of the sixteenth section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him, which shall be purchased, taken, detained, or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him—so much of section seventeen as declares, that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale—and so much of section twenty-five as declares that intoxicating liquor, kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance—are repugnant to the provisions of the Constitution for the protection of liberty and property, and absolutely void.

The proceedings in both the cases are reversed and set aside, and Philip Berberrich is discharged from his arrest.

DECISION OF

HON. JAMES M. SMITH, JR.,

RECORDER OF THE CITY OF NEW YORK.

In the Court of Sessions, Recorder Smith rendered the following Decision in the case of the People, &c., *ex rel.* Martin *vs.* Dowd:

On the tenth day of July inst., Mary Martin made an affidavit before Police Justice Wood, in which she alleged, that on the 8th day of July aforesaid, intoxicating liquor, to wit, brandy, was sold to her by the defendant, Thomas Dowd, in violation of the provisions of the act entitled: "An Act for the Suppression of Intemperance, Pauperism, and Crime, passed April 9, 1855," and that she paid for said liquor, and drank the same on the premises of the defendant.

Upon this affidavit, Justice Wood issued a warrant for the defendant; the defendant was arrested, taken before the justice, and held to bail to answer the charge at the Special Sessions. On appearing in this court, the defendant waived his right of trial by jury, and interposed a plea of not guilty. Upon the trial, the defendant admitted that he sold brandy to the witness, Martin, at the time specified by her in her affidavit, but coupled the admission with the averment that the brandy sold was imported.

Notwithstanding the admission of the defendant, the witness, Martin, was sworn on behalf of the people, and confirmed the facts as to the sale of the liquor by the defendant to the witness, as stated in the affidavit upon which the warrant was issued, and in reply to a question by the defendant's counsel, she stated that she did not know whether the brandy was imported liquor.

I regret, that no counsel was present to represent the prosecution upon a question of so much interest as the one involved in this case. It would have been gratifying to me to have had the question on both sides fully presented and discussed.

Previous to the passage of the act above referred to, the power to grant licenses to sell liquor, &c., in the city of New York, was vested in the Mayor and Common Council. The same act that conferred upon them the power to grant licenses, also imposed specific penalties for the violation of the excise law—penalties that could be enforced by civil remedy, and also fine and imprisonment to be enforced by a criminal prosecution as for a misdemeanor.

The statutes of this state, imposed penalties for selling without *such a license, as was provided in the then existing laws.*

The licenses then authorized are expressly abolished by the

twenty-fifth section of the act of April 9, 1855. And no license can be granted except the license mentioned in the second section of that act.

I know it has been contended that the penalties under the statutes, existing before the act of April are still in force, and are not affected by the last mentioned act. That the penalty imposed there was for selling liquor without a license, and that now, when no license can be obtained to sell, the old statute is still operative. I do not so understand the law. The penalty under the old statute was a *specific penalty*, imposed for selling without the *specific license* mentioned in that statute.

The statute imposing the penalty is repealed by the twenty-fourth section of the act of April. The penalty expires with the law that created it and we must seek in the new law, in the act of April, and that only, for the license and for the penalty. The twenty-fourth section of that act is broad and sweeping in its terms; it repeals "all the acts and parts of acts, and all charters and parts of charters" inconsistent with the act.

The Legislature in framing that section clearly intended to effect such repeal, and for the purpose of preventing actions then in progress from being effected by it, enacted that no suit commenced, or indictment found before the act took effect, should in any measure be effected thereby.

There would have been no necessity for the last paragraph of the twentieth section, if the Legislature intended that the old penalties for selling liquor without license should remain operative. The question, then before the Court is, has the defendant violated any of the provisions of the act of the 9th of April, and if so, what penalty has he incurred? The first section of the act reads as follows:

"Intoxicating liquor, (except as hereinafter provided,) shall not be sold, or kept for sale, or with intent to be sold, by any person, for himself, or any other person, in any place whatsoever; nor shall it be given away, (except as a medicine, by a physician pursuing the practice of medicine as a business, or for sacramental purposes,) nor be kept with the intent to be given away, in any place whatever, except a dwelling-house in which, or in any part of which, no tavern, store, grocery, shop, boarding or victualing-house, or a room for gambling, dancing, or other public amusement or recreation of any kind, is kept; nor shall it be kept or deposited in any place whatsoever, except in such dwelling-house as above described, or in a church or place of worship, for sacramental purposes, or in a place where either some chemical, mechanical, or medicinal act requiring the use of spirituous liquor is carried on as a regular branch of business, or while in actual transportation from one place to another, or stored in a warehouse, prior to its reaching the place of destination. This section shall not apply to liquor, the right to sell which in this state, is given by any law or treaty of the United States."

Had the section ended at the word "destination," the question presented by the counsel for the defendant could not have arisen. But, it is now contended by the counsel, that, although his client has sold liquor without license, he has not violated any of the provisions of the act of April, or of any existing statute; that the latter clause of the first section in terms excepts imported liquor from the operation of the act; that the right to import liquor into this state, under the law, and under treaties of the United States, is conceded; and that the right to sell is incident to the right to import. The fact, I think, cannot be disputed, that this law was not passed as originally framed. That it was not the offspring of one mind, but, on the contrary, that section after section was framed by different persons; that it was altered and remodelled to meet different views, and to silence prejudice against certain sections; and that the necessity for these frequent alterations, additions, and amendments, arose from the fact, that without them the bill would never have become a law. What may have been the intention of the framer, or framers, of the latter clause of the first section, we can only derive from the language embodied in it.

The judicial construction must be predicted upon that and that alone, whatever the intention of the Legislature might have been, is a matter of no moment in the consideration of penal statutes, unless that intent is clearly and distinctly expressed. In other words, if the disputed point is so ambiguous as to admit of two constructions, that construction most favorable to the party to be effected by it, is the construction that must prevail.

The laws which restrain, such as those that forbid any thing that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offences, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting and others; the like are to be interpreted in such a manner as not to be applied beyond what is clearly expressed in the law, to any consequences to which the laws do not extend.

And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of. Is not this act one to which this rule of law applies? It is an act in derogation of the common law, highly penal in its nature, destructive to property in its consequences, jeopardizing liberty, and inflicting the loss of social position and civil rights, summary in its execution, granting extraordinary powers to irresponsible persons, and affording no adequate redress to the parties injured.

Applying the doctrine which I have above stated to this act, the justice of which cannot be fairly questioned, has the defendant violated any act of its provisions, and if so, what is the penalty incurred? The first question which arises is, Is there

any law or treaty of the United States, which gives the right to sell imported liquor in this state?

The affirmative of this question is too well settled to be seriously contested. But it is contended that though the right to import, carries with it the right to sell, yet the right is confined to sales in the original packages, and, that when the liquor leaves the hands of the importer, and gets into the hands of the jobber or consumer, the right to regulate the traffic in the article, is vested in the state government, and is subjected to such excise laws and regulations, as by the state government may be adopted.

That question has been so decided in the United States Courts, and is now the settled law of the land. But does the question involved in those decisions, arise in this case? The first section of the act says it does not apply "to liquor," the right to sell which is "given," &c. The exception in the section is in favor of the liquor—imported liquor; and therefore the decisions of the United States Courts, do not apply to the question before this court, upon the construction of this statute.

We have no right to say, in construing a penal statute, that the insertion of a clause in the law that was entirely unnecessary to carry out what is now alleged, was the intention of the Legislature, was inserted merely for the purpose of avoiding the oft agitated question relating to the sale of imported liquor, which had heretofore embarrassed the law of prohibition; and that the latter clause of the first section was inserted for the purpose of declaring that the law was not in conflict with the decisions in the United States Courts upon that question. Effect must be given to every portion of a statute. Unless it was intended by the Legislature to exempt imported liquors from the operation of the act, it would have been very easy, by leaving out entirely the latter clause of the first section, or by a slight change in the phraseology, to have obviated all difficulty as to the effect of the latter clause, so far as that question is involved. Suppose the section had read thus: "This section shall not apply to the sale of imported liquor in original packages, in the hands of the importer, in any case where the right to import such liquor is given by any law or treaty of the United States;" then the statute would have been clear and free from this embarrassment.

It has been claimed that the act should be construed as if it read as last stated. I cannot so construe it. Judicial officers do not possess legislative powers, and where liberty, reputation, and property are at stake, courts have no right to assume doubtful ones. It is therefore resolved into this: The section exempts imported liquor, that being the liquor, the right to sell which is given, because the right to import implies the right to sell, and the exemption being absolute, it is taken out of the restriction imposed upon other liquor.

Although the twenty-second section of the act declares, that the

act shall not be so construed as to prevent the importer of foreign liquor from keeping or selling the same in the original packages, to any persons authorized by the act to sell liquor. This refers to the importers specifically. The insertion of the section was wholly unnecessary. The right existed without state legislative permission.

The latter clause of the first section is general in its operation, and refers, as I have before stated, to the liquor itself, in its broadest and most general terms. At common law, as I before have had occasion to remark, the traffic in liquor is free. It is by statutory regulations that it is restrained.

The statutory regulations that existed in this state, up to the passage of the act of April last, are all repealed, except that imposing a penalty for the sale of liquor on Sunday, and the act of April is substituted. In that act, imported liquor, as I understand it, is exempt from its operation by express enactment, and the only license that is to be required is the license under the second section, which, in my opinion, applies to intoxicating liquor, other than that which is imported.

Suppose, by way of illustration, the last clause of the first section had read: This section shall not apply to "cider," instead of "to liquor," would it be contended that any penalty would attach to the sale of cider, without license? The word liquor implying, as it does, from the context, imported liquor, is equally exempt as cider would have been, had the word cider been inserted in the place of liquor.

The twenty-second section does not in any way tend to authorize a different construction. It is merely declaratory of an existing right—a right which no state legislation could interfere with. It was probably inserted, before the last clause of the first section was added, and is at most only declaratory of a then existing right under the law of the United States regulating commerce.

I have examined this question with great care, knowing the deep interest felt by the community in the question at issue. I have consulted the authorities bearing upon the question involved, and applying the principles of the law, as to the construction of penal statutes to the act under consideration, I have come to the following conclusion:

That it is no offence to sell imported liquor without having obtained the license mentioned in the act of April.

As this case is presented, it is unnecessary to pass upon other questions arising under the act, as they are not necessarily involved in the merits of the case under consideration.

The defendant is discharged.

In the other case tried before me, the People on complaint of Henry Hill *vs.* Charles E. Smith, the same principles are involved, and the facts are substantially the same. The defendant in that case is also discharged. The statute in these cases allows costs to the prevailing party.

AN ACT

FOR THE PREVENTION OF INTEMPERANCE, PAUPERISM, AND CRIME.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

THE WAY LIQUOR IS TO BE SOLD.

SECTION I. Intoxicating liquor, except as hereinafter provided, shall not be sold, or kept for sale, or with intent to be sold, by any person, for himself or any other person, in any place whatsoever; nor shall it be given away, (except as a medicine, by physicians pursuing the practice of medicine as a business, or for sacramental purposes,) nor be kept with intent to be given away in any place whatsoever, except in a dwelling-house in which, or in any part of which, no tavern, store, grocery-shop, boarding or victualing house, or a room for gambling, dancing, or other public amusement or recreation of any kind is kept; nor shall it be kept or deposited in any place whatsoever, except in such dwelling-house, as above described, or in a church, or place of worship, for sacramental purposes, or in a place where either some chemical, mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while in actual transportation, from one place to another, or stored in a warehouse prior to its reaching the place of its destination. This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States.

THE AGENTS TO SELL LIQUOR.

SEC. II. Any citizen, of good moral character, who is an elector of the town or city where he intends to sell intoxicating liquor, as hereinafter provided, and who is not a pedlar, nor the keeper of, or interested in any boarding or victualing house, grocery or fruit store, or any bar-room, confectionary, inn, tavern, or other place of public entertainment, or the keeper of, or interested in, any museum, theatre, or other place of public amusement, nor the captain, commandant, agent, clerk, or servant of or on any vessel, boat, or water craft of any kind whatever, may keep for sale, and may sell intoxicating liquor and alcohol, for mechanical, chemical, or medicinal purposes, and wine for sacramental use; provided he shall, within one year previous, have filed in the office of the Clerk of the County, in which such liquor is to be sold, an undertaking executed by himself and two good and sufficient sureties, to be approved by the County Judge of the said County, or in the city of New York, by one of the Judges of the Common Pleas, and acknowledged before said Judge, that he will not violate any provision of this act, and will pay all fines, damages, and costs which may be imposed upon or recovered against him in any action, civil or criminal, to be commenced under any of the provisions of this act; and provided further, that he shall also have filed, with his undertaking or declaration, an oath or affirmation, taken before said Judge, setting forth the town or ward, and particularly designating and describing the premises and place in which

he intends to sell such liquor, and declaring that he is an elector of such town or ward, and does not use intoxicating liquor as a beverage, and is not, and during the time he shall sell such liquor, will not be a pedlar, nor the keeper of, nor interested in any inn, tavern, boarding-house, victualing-house, grocery or fruit-store, bar-room, confectionary, or other place of public entertainment, nor the keeper of, nor interested in any theatre, museum, or other place of public amusement, or the captain, commander, agent, clerk, or servant of or on any vessel, boat, or water craft of any kind whatever, and will not violate any provision of this act, and provided further, that he shall, within one year previous, have filed a copy of such undertaking and declaration, certified by the County Clerk, in the office of the Clerk of the town or city in which such liquor is to be sold. No such undertaking shall be approved by any such Judge, unless the applicant shall be a man of good moral character, and such sureties shall be householders within such county, and shall severally justify, in the sum of $500 each, over and above all debts, demands, liabilities, or legal exceptions, and shall also make oath or affirmation that they have not become possessed of any property for the purpose of enabling them to justify as such sureties, and that they are not and will not become, directly or indirectly, engaged or interested in the manufacture or sale of intoxicating liquor during the continuance of their suretyship.

Sec. III. Any person, authorized as in the last section provided, shall not do any thing contrary to his said undertaking, nor to what he has sworn in his said oath or affirmation; nor shall he sell any liquor known by him to be impure or adulterated, nor shall he suffer any liquor sold by him to be drunk upon the premises where the same is sold; but he may sell in the following cases, and no other:

1. To any person of the age of 21 years, being of good character for sobriety, provided the person selling the same shall have good reason to believe, and shall believe that the same is intended by the purchaser to be used for some of the purposes in the preceding section named, and not to be sold, disposed of, or given away, or to be drunk on the premises contrary to the provisions of this act; or,

2. To any person authorized to sell such liquor as in the last section provided.

Every person authorized to sell, as in the last section provided, shall keep a book of sales, in which he shall enter, or cause to be entered, every sale made by him, which entry shall contain the kind, quantity, price, purpose for which, name of the person to whom, and time when sold, which book shall, at all times during business hours, be open to public examination by any resident of the town or city. Every person so selling liquor shall file with the clerk of the town or city. Every person so selling shall file with the clerk of the town or city where he sells the same, between the first and fifteenth day of each month, a sworn copy of such sales, and of all purchases made by him, containing kind, quantity, and price, with an affidavit that the same contains a correct account of the sales, and all the sales and purchases made by him during the previous month, according to his best knowledge, information, and belief; but nothing in this act contained shall be construed to prevent the sale by legal process, (in case of the insolvency of the authorized liquor-seller,) of any liquors held by him at the time of such insolvency, to any other liquor-seller authorized to sell by this act; nor to prevent the legal representatives of any deceased person, (who, at the time of his decease wasan authorized liquor-seller,) from selling any such liquors as may come to their pos-

session as property of such deceased liquor-seller, to any person authorized by this act to sell liquor.

PUNISHMENT FOR THE VIOLATION OF THE PRECEDING SECTIONS.

SEC. IV. Every person who shall violate any provision of either of the preceding sections, shall, upon conviction, be adjudged guilty of a misdemeanor, and except for failure to file his return to make his entries as in the last section provided, shall forfeit all the liquor kept by him in violation of either of the preceding sections, and be punished as follows: For any violation of section first, for the first offence, by a fine of fifty dollars; for the second offence, by a fine of one hundred dollars, and thirty days imprisonment; for the third and every subsequent offence, by a fine of not less than one hundred, nor more than two hundred and fifty dollars, and by imprisonment, not less than three nor more than six months For any violation of section second or third, by a fine of one hundred dollars, and by imprisonment in the County Jail, not less than thirty days, and be ever thereafter disqualified for selling liquor within this state. Upon every conviction, the defendant shall, also, be required to pay all costs and fees, as provided in this act. In default of payment of any such fine, costs, and fees, or any part thereof, the defendant shall be committed until the same are paid, not less than one day per dollar of the amount unpaid. If any person purchasing any liquor, as in the last section provided, shall, at the time, make any false statement concerning the use to which such liquor is to be applied, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall forfeit and pay a fine of ten dollars and costs, as provided in this act, and stand committed until paid, not less than one day per dollar of the amount unpaid.

SEC. V. Every Justice of the Peace, Police Justice, County Judge, City Judge; and in addition, in the city of New-York, the Recorder, each Justice of the Marine Court, and the Justices of the District Courts—and in all cities where there is Recorder's Court—the Recorder shall have power to issue process, to hear and determine charges, and punish for all offences arising under any of the provisions of this act, and they are each hereby authorized and required to hold Courts of Special Sessions for the trial of such offences, and under this act to do all other acts and exercise the same authority that may be done or exercised by Justices of the Peace in criminal cases, and by Courts of Special Sessions, as the same are now constituted; and the term Magistrate as used in this act, shall be deemed to refer to and include each officer named in this section. Such Court of Special Sessions shall not be required to take the examination of any person brought before it, upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified; and for good cause shown, he may adjourn, from time to time, not exceeding twenty days. At the time of joining issue, and not after, either party may demand trial by Jury, in which case the Magistrate shall issue a venire and cause a Jury to be summoned and impanelled as in other criminal cases in Courts of Special Sessions. The complainant may appear upon such trial on behalf of the people, and prosecute the same with or without counsel. He may also prosecute the same in all the Courts to which, as hereinafter provided, appeal may be taken by Attorney, or he may apply to the District Attorney, whose duty it shall be, upon such application, to appear and conduct said appeal from the judgment thereon. The same costs and disbursements shall be allowed against the defendant upon such appeal as are now allowed in civil actions, in those Courts to which appeals may be taken, according to the provisions of this act. In all cases,

if the District Attorney shall appear and conduct the trial on appeal, or both, the costs, if any, shall go to him for his individual use, in other cases, to the complainant, and, in default of the payment of the whole, or any part thereof, the defendant may be committed to the same extent as provided in the fourth section of this act.

THE SEARCHING PROCESS.

SEC. VI. Whenever complaint on oath or affirmation shall be made in writing to any Magistrate, by one or more credible persons, resident of the county where the complaint is made, or of an adjoining county, that he or they have reason to believe, and do believe, that intoxicating liquor is kept or deposited in violation of any provision of section first of this act, whether the person so keeping or depositing the same, is or is not known to the complainant in some specified place or places within the city or town in which such complaint is made, or upon any water adjacent thereto, or within five hundred yards of the boundaries thereof, which complaint shall state the facts and circumstances upon which such belief is founded, or such facts and circumstances shall be stated upon oath or affirmation of some other person, it shall be the duty of such Magistrate, if he is satisfied that there is probable cause for said belief, forthwith to issue a warrant, directed in the same manner as criminal processes are now directed, commanding the officer, with proper assistance, forthwith diligently to search such place or places, and to seize all intoxicating liquor found therein, which from said complaint or other proof furnished, said Magistrate shall be satisfied there is probable cause for believing is kept or deposited in violation of any provision of section first, together with the vessels in which the same is contained, and to store the same in some safe and convenient place, to be disposed of as hereinafter provided. If from such complaint, or proof, or both, the person so keeping or depositing said liquor shall be made known, or ascertained to the satisfaction of said magistrate, he shall issue a separate warrant for the arrest of such person, to be dealt with according to the provisions of this act. But no warrant shall be issued under this act, to search any such dwelling house as is described in section first of this act, unless the occupant thereof shall have been convicted, as hereinbefore provided, of having sold intoxicating liquor in his dwelling house, or suffered it to be done, within one year next preceding the issuing thereof. Every warrant so issued shall particularly describe the place to be searched, and the things to be seized.

THE SEIZURE OF LIQUOR.

SEC. VII. Whenever any liquor shall be seized under any provisions of this act, it shall be the duty of the officer by whom such seizure is made, except in cases where the owner thereof shall have been arrested, forthwith to give written notice to the owner or his agent, if known, of the seizure of such liquors, which, and the vessels containing the same, shall be described in such notice as near as may be, and of the name of the magistrate by whom the warrant was issued, or in case of seizure under section twelfth, before whom the person arrested was carried, and the name and residence of such officer making such seizure, and the time of such seizure. Such notice shall be served by delivering it to the owner or his agent, personally, or by leaving the same at his last or usual place of residence, with a person of mature age, residing on the premises. If the owner or his agent cannot be found, and his place of residence is not known to the officer, such notice shall be served by delivering the same to any person of mature age, residing or being

employed in the place in which such liquor was contained, or, if none such can be found, by posting the same in a conspicuous place upon the outer door of such place; and copies of such notice containing also a description of the place in which such liquor was found, shall forthwith be conspicuously posted in at least three public places, within said city or town. Any person may, at any time, before forfeiture, present to the magistrate named in such notice, an affidavit or affirmation in writing, stating that such liquor, at the time of such seizure, was actually owned by him, or by some other person named by him, for whom he is agent; that he or such person had not become possessed thereof, for the purpose of preventing its forfeiture, and that the same had not been kept contrary to the provisions of this act, to the best of his knowledge and belief, and also specifying the purpose for which, the place where, under which exception of section first the same was kept, and the facts particularly showing it to be within the exception; and thereupon the same proceedings before said magistrate, shall in all respects be had, as are provided in section fifth.

Upon the trial of such claim, the Custom House certificates of importation, and proofs of marks, on the casks or packages corresponding thereto, shall not be received as sufficient evidence that the liquors contained in said casks or packages, are those actually imported therein. The magistrate shall keep minutes of the proceedings, testimony, and judgment, upon all trials under this, or section fifth, which shall be subscribed by him. He shall have power to issue process to compel the attendance of witnesses, and to punish for non-attendance as witnesses, or jurors, in the same manner as in civil actions before justices of the peace.

APPEAL TO THE SUPREME COURT.

Sec. VIII. Either the complainant or other person prosecuting in behalf of the people, or defendant, may appeal to the Supreme Court at General Term, from any judgment of any magistrate rendered under any provision of this act, by serving upon such magistrate, and the complainant or such other person, or the defendant, as the case may be, written notice thereof, specifying the grounds of appeal, within ten days after the rendering of such judgment, the service to be made as now provided in appeals from Justice Courts in civil actions. The decision of the Supreme Court shall be final, unless with the decision one of the Judges thereof, shall file a certificate that a legal question is involved therein, upon which it is proper to take the opinion of the Court of Appeals, in which case an appeal may be taken to the Court of Appeals. The service of such notice shall be of no effect on behalf of the defendant or complainant, unless he shall at the same time deliver to the magistrate an undertaking to the people of the state of New York, in the sum of $500, with one or more sureties, to be approved by such magistrate, or County Judge, conditioned that, if the judgment be affirmed on such appeal, or upon a subsequent appeal from the decision of the Supreme Court to the Court of Appeals, they will pay the amount of the fine and costs contained in such judgment, and that the defendant shall not, during the pendency of said appeal, violate any provision of this act, and that they will jointly and severally pay all fines, damages, and costs which may be against him in consequence of any such violation; and in case such defendant shall be required by such judgment to be imprisoned or to stand committed, with the further condition that he will appear in the Court of General Sessions of said County, at the term thereof next after the affirmance of such judgment, and not depart therefrom without leave, and by the order of such Court of General Sessions, as to such imprisonment or commitment. Upon the giving of such notice, and undertaking, all further proceedings upon such judg-

ment shall be stayed, until such appeal shall have been decided, or dismissed for want of prosecution, as hereinafter provided. No proceeding or judgment had or rendered under any provision of this act, shall be set aside or be void by reason of any technical errors or defects not affecting the merits; but the same may be amended without notice before or after judgment, or upon appeal or review, or after judgment rendered upon appeal or review, when by such amendment substantial justice will be promoted. Any judgment or verdict rendered under any provision of this act against evidence, may be reversed upon appeal, as in civil actions. All appeals from judgments, under this act, shall have the same precedence as other criminal causes, and may be moved out of their order at any time by either party.

SEC. IX. Whenever any appeal shall be taken according to the provisions of the last section, it shall be the duty of the magistrate, within ten days thereafter, to file a return of the testimony and proceedings had before him upon the trial of such action, together with the notice of appeal and undertaking, if any, and his certificate that the same contains all the testimony and proceedings had before him on such trial, in the office of the County Clerk of the county in which the trial was had. After the filing of the papers as aforesaid, the same rules and proceedings shall in all respects govern the appeal to the final determination thereof, as to amending the return of said magistrate, as are now provided in civil actions, except as hereinbefore modified; provided, nevertheless, if either the complainant or defendant cannot be found to be served with notice, as now provided, the same may be served by filing it with the County Clerk, and attaching thereunto an affidavit containing the reasons for so doing. If the complainant, other than some one of the officers whose duty it is made to enter complaint, shall fail to appear and defend or prosecute any appeal brought under any provision of this act, or to apply to the District Attorney, as provided in section fifth, he shall be personally liable to the defendant, for the costs of said defendant, to be recovered in a civil action. All executions issued upon the final determination of any appeal adversely to the defendant, to collect the judgment thereon, shall be in the name of the people of the state of New York, against the property and person. If any execution so issued shall be returned unsatisfied, in whole or in part, the District Attorney may, and he is hereby authorized, to bring an action upon such undertaking, in the name of the People of the State of New-York, and recover therein the amount of such judgment and costs.

WHAT SHALL BE DONE WITH THE LIQUOR IMPROPERLY SEIZED—DESTRUCTION OF FORFEITED LIQUOR.

SEC. X. Whenever any liquor seized under the provision of this act shall not be adjudged forfeited, the officer having the same in custody shall return it to the place where it was seized; but when it shall be adjudged forfeited, as provided in any section of this act, or whenever any trial shall have resulted adversely to the defendant, and the time for serving notice of appeal shall have elapsed and no notice and undertaking shall have been served, or the judgment appealed from shall have been finally decided adversely to the defendant, and notice thereof given to the magistrate before whom the trial was had, it shall be the duty of said magistrate forthwith to issue a warrant commanding that the liquor so seized and forfeited to be destroyed. And the officer to whom the same shall be delivered shall forthwith proceed in the presence of one of the complainants, or of some other person to be designated in such warrant, and to be summoned by him to execute the same, and such person shall join with the officer in making return, by affidavit, of the

time, place, and manner of the execution of such warrant, and upon the receipt of said return, said magistrate shall order execution to issue to said officer, who shall proceed to sell the vessels which contained said liquor; and the proceeds of said sale shall be applied in like manner as provided by this act in other cases.

SUMMONS AGAINST SUSPECTED PERSONS.

SEC. XI. Whenever complaint on oath or affirmation in writing, which complaint shall state the facts and circumstances upon which his belief is founded, shall be made before any magistrate, by any person, that he has just cause to suspect and believe, and does believe that any offence against any provision of this act has been committed, and that some other person or persons named by him has or have knowledge of the commission as such offence, such magistrate, if he thinks there is probable cause to believe that such offence has been committed, and that such person or persons has or have knowledge of the commission of such offence, shall forthwith issue a summons to the person or persons so named, commanding him or them to appear before him, at a place and time, not more than four days thereafter, to be designated in such summons, to testify in relation to such complaint. Such summons may be served in the same or in an adjoining county by any officer to whom the same shall be delivered, or by any other person, by stating the contents, or delivering a copy thereof, to the person or persons named therein, and at the same time showing him or them the original. If the person or persons so summoned shall fail to appear, the magistrate, upon proof of the service of such summons by the return of an officer, or the oath of any person, shall issue an attachment to compel their attendance for the purpose of giving such testimony, which attachment may be executed in any part of the state. The person so attached may, unless some reasonable cause or excuse be shown by his own oath, or the oath of some other person, be punished by a fine of not less than ten dollars, and in default of payment, he may be committed to the same extent as provided in the fourth section.

DUTIES OF MAGISTRATES AND OTHER OFFICERS—INTOXICATED INDIVIDUALS AND THEIR FATE.

SEC. XII. It shall be the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, or policeman, to serve all processes to be issued by virtue of this act, to arrest any person whom he shall see actually engaged in the commission of any offence in violation of the first section of this act, and to seize all liquors kept in violation of said section, at the time and place of the commission of such offence, together with the vessels in which the same is contained, and forthwith to convey such person before any magistrate of the same city or town, to be dealt with according to law, and to store the liquor and vessels so seized in some convenient place, to be disposed of as hereinafter provided. It shall be the duty of every officer by whom any arrest and seizure shall be made under this section, to make complaint, on oath, against the person or persons arrested, and to prosecute such complaint to judgment and execution. It shall be the duty of every such officer, whenever he shall see any person intoxicated in any store, hotel, street, alley, highway, or place, or disturbing the public peace and quiet, to apprehend such person, and take him before some magistrate, and if said magistrate shall, after due examination, deem him too much intoxicated to be examined, or to answer upon oath correctly, he shall direct said officer to keep him in some jail, lockup, or other safe and convenient place, to be designated by said magistrate,

until he shall become sober, and thereupon forthwith to take him before said magistrate, or if he cannot be found, before some other magistrate; and whenever any person shall appear or be brought before any magistrate, as provided in this or the preceding section, it shall be the duty of such magistrate to administer to such person an oath or affirmation, and to examine him as to the cause of such intoxication, and for the purpose of ascertaining whether any offence has been committed against any provision of this act. If upon such examination it shall appear that any such offence has been committed, within the jurisdiction of such magistrate, it shall be his duty to issue a warrant for the arrest of the offender and the search of his premises, as hereinbefore provided. If it shall appear that any such offence has been committed at any place beyond the jurisdiction of such magistrate, it shall be his duty to reduce such examination to writing, and forthwith to certify and send the same to any officer or magistrate having jurisdiction of the offence charged, who shall thereupon proceed in relation to such complaint, in the same manner as if the same had been made before him. If any witness shall refuse to be sworn or affirmed, or to answer any question pertinent to such examination or trial, other than such as will criminate himself, he shall be committed to the common jail of such county, there to remain until he shall consent to be sworn or affirmed, and to answer all questions pertaining to such trial or examination. It shall be unlawful for any person to be, or become intoxicated in any store, grocery, lane, street, or other public place, and for each offence he shall be liable to a fine of ten dollars, to be sued for and recovered in the same manner as fines in the fourth section of this act, and in default of the payment thereof, he shall stand committed as provided in said fourth section; and it shall be the duty of the magistrate before whom such intoxicated person is arrainged, to examine such person as a witness relative to the cause of his intoxication, to ascertain whether any other person has violated the provisions of this act, but the testimony so given shall not in any case be used against him, in any civil or criminal action, except upon an indictment and trial for perjury. All such fines shall be applied to the support of the poor of the city or town where the offence is committed.

FORFEITED LIQUOR.

Sec. XIII. All liquors seized under any provision of this act, except in cases where the owner thereof, shall have been arrested, shall be kept stored for thirty days after service and posting of notices, as required by section seventh, after which time, upon the proof of such service and posting by the return of the officer, endorsed upon the warrant of search, or by other evidence to that effect, such liquors, together with the vessels in which the same were contained, shall be adjudged forfeited, by the magistrate named in such notice, to whom such proof shall have been made, unless they shall have been claimed as hereinbefore provided; and all liquors and vessels in which they are contained, which shall have been found and seized in the possession of any person who shall have been arrested for violating any provision of the first section, and not claimed by any other person, shall, upon conviction of such person of such offence, be adjudged forfeited.

THE DUTY OF OVERSEERS OF THE POOR.

Sec. XIV. It shall be the duty of every supervisor and superintendant of the poor, and overseer of the poor, and it shall be the right of every other person, whenever he shall have any knowledge or information, that any offence has been committed, under any provision of this act, to make complaint or cause complaint to

be made thereof, and to prosecute such complaint in the name of the people. In case any person, other than an officer, shall not make out a *prima facie* case before the magistrate, upon the trial of any complaint under the first section, and it shall appear to the court that he acted maliciously or in bad faith, without probable cause for making such complaint, the court shall render judgment against such person, in favor of the defendant for the costs, and issue execution thereon against the property and person, in the same manner as in civil actions before justices of the Peace. Whenever any fine imposed under any provision of this act, except when otherwise especially provided, shall be collected, it shall be paid, together with all costs to the overseers of the poor of the town in which the offence was committed, for the support of the poor, in cases where such expenses are paid by the town; and where the poor are supported by the county, then to the treasurer of the county.

SEC. XV. A certificate duly proved to be under the hand of any magistrate, stating any such offence charged against any person, and judgment thereon, shall be evidence in all courts and places, of the facts stated therein.

WHO SHALL ACT AS JURORS.

SEC. XVI. No person who shall have been convicted of any offence against any provision of this act, or who shall be engaged in the sale or keeping of intoxicating liquor, contrary to the provisions of this act, shall be competent to act as a juror upon any trial under any provision of this act; and when information shall be communicated to the court that any person, summoned as a juror upon any such trial, has been so convicted, or is engaged in such unlawful sale or keeping, or is believed to have been so convicted, or to be so engaged, it shall be the duty of the court to examine such person upon oath in relation thereto; and no answer that he may make shall be used against him in any action or prosecution which may be commenced against him under any provision of this act, except for perjury, on such examination; but he may decline to answer, in which case he shall be discharged as a juryman on such trial. No person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any person, unless he shall prove that such liquor was sold according to the provisions of this act, or was lawfully kept and owned by him.

NECESSARY PROOF IN TRIALS.

SEC. XVII. Upon the trial of any complaint, commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale. No evidence shall be received in justification of such sale under the second section, unless the defendant in his plea or answer shall have avowed such sale under said section, and shall have accompanied such plea or answer with an affidavit, or affirmation, that at the time of such sale he verily believed, that the liquor sold was intended by the purchaser to be actually used in some other way than as a beverage, and not to be sold, disposed of, or given away, or used on the premises, or that such purchaser was duly authorized to sell liquors as provided by the second section of this act, as the case may be, and also setting forth the circumstances of such sale, and the reasons upon which such belief was founded.

IMPORTATION AND TRANSPORTATION OF LIQUOR.

SEC. XVIII. No person or corporation shall knowingly carry or transport any liquor within this state, from any place within the United States, and no person shall knowingly deliver any liquor to any other person, or to any other corporation, for the purpose of being so carried or transported, unless the name and place of business or residence of the person to whom the same is to be conveyed, together with the words "intoxicating liquor," are visibly and distinctly marked on the outside package or cask in which the same is contained. But this section shall not apply to the carrying of liquor, in quantities of five gallons or less, to any place within the county in which the same was sold, or within an adjoining county. Any person or corporation offending against any provision of this section shall be liable to a penalty of $50, to be sued for and recovered by and in the name of any person who shall first commence an action therefor. No person, for himself or agent for any company or corporation, engaged in the carrying either of persons or property, shall act as agent for any person for the purchase of any liquors, other than those authorized by this act to sell the same, while engaged in such carrying trade. Whoever shall violate this provision shall be liable to a penalty of one hundred dollars, as herein provided—to be sued for and recovered in the same manner as is provided for violations of section first of this act.

IMPRISONMENT OF CONVICTED PERSONS.

SEC. XIX. In any county in which there now is, or hereafter may be, a penitentiary, the court before which any conviction is had for an offence against any provision of this act, may, in its discretion, sentence and commit the person convicted to such penitentiary, instead of the jail of such county, and whenever the punishment under any provision of this act is imprisonment or commitment, it shall be a commitment to the penitentiary or county jail, without the liberties thereof.

NEGLECT OF OFFICERS.

SEC. XX. Every public officer who shall neglect or refuse to perform any duty required of him by any section of this act, shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or by both such fine and imprisonment; such conviction shall work a forfeiture of office in all cases, except those of judicial officers. Any person who shall directly or indirectly oppose or resist any officer, or any one called by him to his aid in the execution of any duty under this act, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than $200, and by imprisonment not less than six months. The existing provisions of law relative to misdemeanors and offences shall apply to offences created by this act, except where the same are inconsistent therewith.

FEES FOR SERVICES.

SEC. XXI. There shall be allowed and included in every judgment, for costs for the following services rendered under the provisions of this act, the following fees, which shall be audited and paid in the same manner as fees in other criminal cases, and whenever judgments shall be rendered for costs, there shall be included therein fees for such prospective services as shall be necessary to enforce such

judgments; and when no fees are herein provided, the same fees as are now provided in criminal cases for similar services.

To any magistrate performing the following services:

For every warrant or summons of any kind, twenty-five cents.

For the trial of any claim, one dollar for each day actually engaged therein.

For a certificate of conviction, twenty-five cents,

For taking and certifying complaint to another magistrate, fifty cents.

To any sheriff or other officer performing the following services:

For serving summons for witnesses, for each person served, twenty-five cents.

For executing any warrant of search, or making any seizure without process, one dollar.

For conveying liquor seized to place of storage, fifty cents, besides necessary expenses of labor, cartage, and storage.

For executing warrant for destruction of forfeited liquor, besides actual expenses, one dollar.

For conveying certified complaint to any magistrate, twenty-five cents.

For every mile necessarily travelled, more than one, in performing any of the above services, six cents.

To the person, other than the complainant, summoned to witness the destruction of forfeited liquor, for witnessing such destruction, and joining with the officer in making proof thereof, one dollar.

To any supervisor, or superintendant of the poor, or overseer of the poor, two dollars for each day in which he is necessarily and actually engaged in attending to any complaint or prosecution, and six cents for each mile necessarily travelled.

THE SALE OF CIDER, BURNING FLUIDS, PERFUMERY, ETC.

SEC. XXII. Nothing in this act shall be construed so as to prevent the sale of cider, in quantities not less than ten gallons. But no cider so sold shall be drunk on the premises of the seller; and any such drinking, or a re-purchase by the seller of a portion of the cidersold by him, shall subject him to the penalties provided in section third of this act. Nor shall this act be construed so as to prevent the manufacturer of alcohol, or of pure wine from grapes grown by him, from keeping or from selling such alcohol or wine, nor the importer of foreign liquor from keeping or selling the same in the original packages, to any person authorized by this act to sell such liquors. Nor shall any provisions of this act be construed to prohibit the manufacture or keeping for sale, nor from selling burning fluids of any kind, perfumery, essences, drugs, varnishes, nor any other article which may be composed in part of alcohol, or other spirituous liquors, if not adapted to use as a beverage, or intended to be used as a beverage, or in evasion of this act; nor shall it be lawful to seize, sell, or destroy any liquors deposited or found in any bonded warehouse within the limits of this state, nor prevent any liquors imported into the United States from being taken from such bonded warehouse, to any place beyond the limits of this state. The term "intoxicating liquor," and "liquor," as used in this act, shall be construed to extend to and include alcohol, distilled and malt liquors, and all liquors that can intoxicate, and all drugged liquors, and mixed liquors, part of which is alcohol, distilled, or malt liquor.

SEC. XXIII. It shall be the duty of the presiding Judge of every Court of Oyer and Terminer, and of every Court of Sessions, specially to charge every Grand Jury to inquire into all violations of, or offences under, this act.

SEC. XXIV. All acts and parts of acts, and all charters and parts of charters, inconsistent with this act are hereby repealed. But no suit commenced, or indictment found, before this act takes effect, shall in any manner be affected thereby.

SEC. XXV. No license to sell liquor, except as herein provided, shall hereafter be granted. All liquor kept in violation of any provision or provisions of this act, shall be deemed and is hereby declared to be a public nuisance.

SEC. XXVI. The second section of this act shall take effect on the first day of May next: section twenty-five shall take effect immediately, and all parts thereof on the fourth day of July next.

STATE OF NEW-YORK, Secretary's Office. I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and of the whole of the said original law.

[L. S.] Given under my hand and seal of office, at the city of Albany, this eleventh day of April, in the year one thousand eight hundred and fifty-five.

E. W. LEAVENWORTH, *Secretary of State.*

The following was the FINAL VOTE upon the PASSAGE of the foregoing Act.

SENATE.

AYES—21.

Messrs. Bishop.	Messrs. Dorrance.	Messrs. Hopkins.	Messrs. Sherill.
" Bradford.	" Field.	" Munro.	" Walker.
" Butts.	" Goodwin.	" Patham.	" Whitney.
" W. Clarke.	" Halsey.	" Richards.	" Williams.
" Z. Clarke.	" Hitchcock.	" Robertson.	" Dickinson.
" Danforth.			

NAYS—11.

Messrs. Bernard.	Messrs. Crosby.	Messrs. Pratt.	Messrs. Watts.
" Barr.	" Hutchins.	" Spencer.	" Yost.
" Brooks.	" Lansing.	" Storing.	

ASSEMBLY.

AYES—81.

Messrs. Baldwin.	Messrs. Kirkland.	Messrs. Platt.	Messrs. Van Osdal.
" J. Bennett.	" Lamport.	" Ramsay.	" Warner.
" J. P. Bennett.	" Leigh.	" Raymond.	" Walker.
" Beyer.	" Littlefield.	" Rickerson.	" Ward.
" Boynton.	" Lourie.	" Ryder.	" Wells.
" Brush.	" Machaw.	" Rhodes.	" E. S. Whalen.
" Buckley.	" McKinney.	" Schuyler.	" S. S. Whallon.
" Bushnell.	" Mullory.	" B. Smith.	" A. G. Williams.
" Chester.	" Main.	" E. L. Smith.	" G. D. Williams.
" Cocks.	" Masters.	" J. A. Smith.	" Wilsey.
" S. B. Cole.	" May.	" S Smith.	" Wesner.
" Gleason.	" E. Miller.	" Speaker.	" Worden.
" Goddard.	" L. Miller.	" Stanton.	" Wygant.
" Headley.	" Munro.	" Stebbins.	" Corey.
" Huil.	" Odell.	" Stevens.	" Eames.
" Hunt.	" Paine.	" Storrs.	" Everest.
" Jimmerson.	" D. Palmer.	" Terhune.	" Fairchild
" C. P. Jonhson.	" F. W. Palmer.	" G. Tompkins.	" Ferdon
" L. B. Johnson.	" Peck.	" I. Tompkins.	" Fitch.
" Kendig.	" Pennoyer.	" Van Etten.	" Gates.
" Knapp.			

NAYS—44

Messrs. Aitken.	Messrs. Churchill.	Messrs. Dumont.	Messrs. Phelps.
" Allen.	" Clarke.	" Edwards.	" Rhode.
" Baker.	" E. Cole.	" Ewans.	" Robinson.
" Beecher.	" Coleman.	" Greene.	" Seagrist.
" Blakelee.	" Comstock.	" Ivans.	" Smally.
" Blatchford.	" Conger.	" Maguire.	" Seymour.
" Blessing.	" Davidson.	" McLaughlin.	" N. B Smith.
" Bridenhucker.	" Davy.	" Mundy.	" Stuyvesant.
" Campbell.	" Devening.	" O'Keefe.	" Wager.
" Case.	" Dixon.	" Parsons.	" Waterbury.
" Chapin.	" Donnan.	" Petty.	" Weed.

ABSENTEES—4.

Messrs. Dodge.	Messrs. J. C. Palmer.	Messrs. Searing.	Messrs E. L. Smith.

LEGISLATIVE POWER.

The natural foundations of society are the wants and fears of individuals. The inability of the weak to protect themselves against the strong, quickened by the social qualities, and weary of a state of war, or of enjoying a liberty of little value from the uncertainty of its duration, induced them to yield up a part of their natural liberty, to enjoy the rest in the security which association promised.

The sum of these portions of the liberty of each individual, so sacrificed, constitutes the supreme power of a state.

Such part of the natural liberty of an individual as is necessary for the preservation of public liberty and order, is all that is conferred upon society.

Although no formal expression of such original contract may have been made, yet in nature and reason, it must always be understood and implied in the act of association. The whole is bound to protect the parts, and the parts must submit to the will of the whole.

This protection and submission extends only so far as the power has been yielded up. This power, thus aggregated, and no more, belongs to the society of which we are members. The due exercise of these powers prevents anarchy and confusion, and order prevails. "Laws, the rules of government, by which public order is preserved, are the conditions under which men unite themselves in society."

The rights and duties, both of governors and governed, rest in contract, express and implied. These rights and duties mutually obligate each party.

As all the members which compose society, are naturally equal, the great question has been, unto whose hands ought the reigns of government to be entrusted.

A general answer, before the adoption of our form of government, was supposed to be easy, but the application of the whip under all governments, has occasioned, and will hereafter, give

rise to all the mischiefs, which must proceed from despotism, or misguided political zeal.

Experience has proved that the deposit of this governmental power, should not only be protected from usurpation, but confined within certain limits. We have retained it where it belongs —with the people. We have said, that it should not be lodged any where else. The three appropriate divisions, of governmental power, from the very nature of the subject, have been for centuries, clearly and accurately drawn. The contention always has and always will be, where and in whose hands shall the powers of government be placed? The functions of government are essentially legislative, judicial, and executive. These alone are constitutionally recognized; neither can perform the office of the other without usurpation. They are as clearly and forever separated as Lazarus and Dives. Placed in different aad distinct hands, it was believed that each would act to preserve the proper balance. The powers of each are not specifically defined in the Constitution. Limitations are stated, and from such limitations a heresy has been sought to be adopted by some members of the judiciary, that for want of limitation, the power is omnipotent in the Legislature. If the argument is sound, the other departments are equally omnipotent. That is, each is uncontrolled in the exercise of any act that may partake of the character of the power conferred, unless the written fundamental law restrains it. If these depositaries of power act conjointly, then we cease to be a republic. Despotism and tyranny ride triumphant. To prevent such a despotism it is forbidden them to act in solid column. All the forms of government known at our advent had been tried, each in its turn had but proved the truth, "that every act of authority, of one man over another for which there was not an absolute necessity, was tyrannical." All mankind had agreed that the three grand requisites of a good government were wisdom, goodness, and power. That man separately, or in combination, did not possess, or at least did not exercise these attributes. They belonged to Deity alone. The great teacher, Experience, had shown that such depositaries had abused the trust. It was well known that society, "like all parts of the physical and moral world, naturally tends to dissolution. That it can only be kept together by motives sufficient to counterbalance the effect of the passions."

The sublimest truths, coupled with the power of eloquence, had

been found insufficient to restrain the passions of men, excited by the lively impressions of present objects."

With this knowledge of mankind, of governments, and of society, the artisans who erected the frame-work of our government attempted the introduction of a new theory, in the hope that it would practically secure the blessings of liberty, and last forever.

Civil liberty, they had seen, was insecure from encroachment, under any and every form of government then known; and albeit political writers of their day admitted but of three forms, in either of which, what was termed the whole sovereign power should reside, yet our ancestors resorted to the then untried experiment of retaining among the people individual liberty, without the fear of, and to prevent, despotism.

To effect it, they felt the necessity of limiting and dividing the supreme power. By their Declaration of Independence, they set forth fundamental principles, which now underlay the corner-stones of the super-structures they afterwards raised. The right to life, liberty, and the pursuit of happiness, they declared inalienable.

To prevent encroachment upon these rights, by the operation of the supreme power, they declared, what indeed had always been conceded, and often declared, that what of power was not given to the government was withheld.

It was hoped that the natural tendency to tyranny in each separate part, would be resisted and controlled by the other. Hence we have what has always been viewed by other nations as an anomalous government—a representative republic. A problem not yet solved by European powers—to them a riddle—to us a blessing, if we hold it fast.

Mr. Jefferson, with a keen eye to the history of the past, and with a knowledge of the tendency of mankind to exercise power arbitrarily, said—"The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the Legislature is really the danger most to be feared, and will continue to be so far many years to come. The tyranny of the Executive power will come in its turn, but at a more distant period." This he said in reference to the federal government, but it is equally applicable to the states.

What did he mean by the tyranny of the Legislature? An

attempt at despotism—an unbridled and unlimited exercise of power which should be wholly arbitrary.

To whom are we to look for safety and protection? To the judiciary. But the Constitution has not marked and defined the exact powers of either. To the intrinsic nature and essence of all, aided by the laws of nature and revelation, we must resort to define them. From these sources, and the essence of freedom, the judiciary may draw the clear and lucid principles to govern all.

To the Legislature is given the power to pass laws of regulation—to enforce order. Its power to prohibit and destroy is confined to causes and things in their nature, condition, and essence, vicious and dangerous to human life or the enjoyment of property. *Life* is sacred, and cannot arbitrarily be taken away. *Liberty* is secure, and cannot be stifled or destroyed. The *pursuit of happiness*, politically speaking, consists in the right to conduct and carry on business—exercise a trade, profession, or employment—to accumulate property having the quality of transmission, with the power of disposition.

These cannot be taken away, except for cause; such cause must exist in some act of the owner, which act must in itself be essentially immoral. Legislative power is not, and cannot be arbitrary. It must submit to the judicial control whenever it attempts to invade life, liberty, or the pursuit of happiness.

Our far seeing forefathers, new builders, with almost prophetic wisdom, neither in state or federal government, made the tenure of the judicial office dependent upon popular clamor. The nomination of a judiciary did not depend upon the corrupt and corrupting influences of party hacks and polluted politicians.

Men were not taken from the inexperienced and unknown ranks of the legal profession, or from among the wholly uninitiated, and elevated to the judicial office. They were not subjected to the ordeal of the ballot-box, and therefore the rights of the minority against arbitrary legislation, were placed under the safeguard of the judicial power. Mr. Jefferson's fears were not directed to this new feature of modern invasion. The science of political ethics had not descended so low as to suggest the Utopian notion of an independent judiciary, subjected to party strife and the ballot-box. Happily for the undying glory of a pure ancestry, they have been permitted to

wrap their mantles around them, and depart without this reproach. They have not lived to see the states degraded by an oppressive system of inquisitorial laws, the insensible and continual encroachments of which, may quickly deprive this nation of its boasted liberty. Unless we emancipate ourselves, we shall soon settle down in an abject state of slavery.

When our courts shall adopt the sound law, complete logic, and judicial eloquence of Judge Chase, of the Supreme Court of the United States, in 3 Dallas' Reports, 387, then, and not until then, will our Legislatures be restrained in the exercise of arbitrary powers.

That learned Judge, in the case referred to, says: "I cannot subscribe to the *omnipotence* of a state Legislature, or that it is *absolute* and *without control*, although its authority should not be *expressly restrained* by the *Constitution or fundamental law* of the state." The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. *The purposes for which men enter into society, will determine the nature and terms of the social compact; and as they are the foundations of the Legislative Power, they will decide what are the proper objects of it.*

The nature and ends of Legislative Power will limit the exercise of it. There are acts which the federal or state Legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of Legislative Power—as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established.

An act of the Legislature, (for I cannot call it a law,) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.

J. R. WHITING.